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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF MONTANA

FROM APRIL 6, 1903, TO OCTOBER 5, 1903.

OFFICIAL REPORT.

VOLUME XXVIII.

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1903.

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Counties of Deer Lodge, Powell and Granite.

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Counties of Flathead and Teton.

District Judge, Hon. D. F. Smith.

Officers (Flathead County—County Seat, Kalispell): County Attorney, G. H. Grubb, Esq.; Clerk of District Court, James K. Lang; Sheriff, O. P. Gregg. (Teton County—County Seat, Chouteau): County Attorney, J. E. Erickson, Esq.; Clerk of District Court, Sterling McDonald; Sheriff, C. Wallace Taylor.

TWELFTH JUDICIAL DISTRICT.

Counties of Chouteau and Valley.

District Judge, Hon. John W. Tattan.

Officers (Chouteau County—County Seat, Fort Benton): County Attorney, Charles N. Pray, Esq.; Clerk of District Court, Charles H. Boyle; Sheriff, John Buckley. (Valley County—County Seat, Glasgow): County Attorney, John J. Kerr, Esq.; Clerk of District Court, John Survant; Sheriff, Harry Cosner.

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CASES DETERMINED

IN THE

SUPREME COURT

AT THE

MARCH TERM, 1903.

THE HON. THEO. BRANTLY, Chief Justice.

<p>THE HON. GEORGE R. MILBURN,</p> <p>THE HON. WILLIAM L. HOLLOWAY,</p>	}	Associate Justices.
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COMMISSIONERS:

HON. JOHN B. CLAYBERG,*

HON. LEW L. CALLAWAY,*

HON. W. H. POORMAN.*

* Qualified April 1, 1903.

COLEMAN, RESPONDENT, v. PERRY ET AL., APPELLANTS.

(No. 1,506.)

(Submitted March 21, 1903. Decided April 6, 1903.)

Master and Servant—Injury to Employee—Motion for Nonsuit
—Question for Jury—Defective Machinery—Assumption of
Risk—Instructions—Pleading.

1. On motion for a nonsuit every fact will be deemed proved which the evidence tends to prove.

28	1
28	61
28	90

28	1
30	58
30	335

28	1
29	333
28	1
31	146

28	1
34	603
34	606

28	1
40	497

2. Evidence in an action by an employe for injuries received from machinery *held* sufficient to warrant the submission of plaintiff's case to the jury, and that a motion to nonsuit was properly denied.
3. Whether a laundry mangle is defective is a proper subject for expert evidence.
4. Code of Civil Procedure, Section 1171, Subdivision 1, authorizes a new trial for any irregularity or abuse of discretion preventing a fair trial. Section 1172 requires that when application is made for such a cause it must be upon affidavits. *Held*, that the failure to show by affidavit an alleged error of the court in commenting on the probable effect of evidence at the time of its reception precludes its review on appeal.
5. The question whether the danger of operating a particular laundry mangle is so obvious that an inexperienced employe could not fail to notice and avoid it in exercising ordinary care, is for the jury.
6. Civil Code, Section 4330, provides that for the breach of an obligation not arising from contract the measure of damages is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not. *Held*, that an instruction, in an action by an employe, that, if she was injured by defendants' negligence, she was entitled to recover what would compensate for all damage "proximately caused by the negligence of defendants, whether such damage could be anticipated or not," was not objectionable for failing to specify by whom the damage need not be anticipated, where there is no showing in the record that appellants asked for any more definite declaration upon the subject.
7. The doctrine of assumption of risk has no application to a case where an inexperienced laundry employe is directed to feed a mangle, the work requiring experience, and the employe receiving no instruction, notice, or warning of defects.
8. Under Code of Civil Procedure, Section 720, requiring a reply only when the answer contains a counterclaim, failure to reply in a personal injury case does not admit allegations of contributory negligence.
MR. JUSTICE MILBURN dissenting in part.

Appeal from District Court, Silver Bow County; John Lindsay, Judge.

ACTION by Elizabeth Coleman against Oliver N. Perry and others. From a judgment in favor of plaintiff and from an order denying a motion for a new trial, defendants appeal. Affirmed.

Messrs. Hamilton & Thresher, for Appellants.

When all the facts upon which the opinion is founded can be ascertained and made intelligible to the court or jury, the opinion of witnesses is not to be received in evidence. (*Sappenfield v. Main St. Ry. Co.*, 27 Pac. 590 (Cal.); *Ferguson v. Hubble*, 97 N. Y. 507.)

The remarks of the court in the presence of the jury was pre-

judicial error. (*Sappenfield v. Main St. Ry. Co.*, 27 Pac. 593 (Cal.); *Nalley v. Carpet Co.*, 51 Conn. 524; *Morse v. Ry. Co.*, 30 Minn. 465; *Corcoran v. Peekskill*, 108 N. Y. 151.)

An employe knowing the nature of the service to be rendered and being able to foresee or anticipate any danger or injury that may come to him or her because of such employment, is presumed to have assumed the risk of such employment and can not recover. (*Goodwell v. M. C. Ry. Co.*, 18 Mont. 298; *Chicago Ry. Co. v. Ross*, 112 U. S. 377; 14 Am. & Eng. Enc. of Law, page 852; *Journeaux v. Stafford Co.*, 81 N. W. 259; *Sappenfield v. Main St. Ry. Co.*, 27 Pac. 593; *DeForest v. Jewett*, 23 Hun. 490; *Richards v. Rough*, 18 N. W. 785.)

Conflicting and contradictory instructions upon a material point are misleading to the jury and ground for reversal. (*Heilbronner v. Lloyd*, 17 Mont. 307; *Flick v. Mining Co.*, 8 Mont. 305.)

The trial court correctly stated the law in instruction No. 12. (*McAndrews v. Ry. Co.*, 15 Mont. 290; 14 Am. & Eng. Ency. of Law, page 852.)

If the plaintiff knew that the machine in question was out of repair in such a way as to be dangerous to her, and failed to mention the fact to her employers, and continued to operate it without complaint, she is presumed to have undertaken the risk and cannot now recover. (*Bogenschutz v. Smith*, 1 S. W. 578 (Ky.); *Laning v. Ry. Co.*, 49 N. Y. 521; *Kelly v. Ry. Co.*, 29 N. W. 173 (Minn.)

Mr. Guy L. Reed, Mr. Peter Breen, and Mr. Robert McBride, for Respondent.

Master is bound to furnish reasonably safe machinery for the use of his servants. (Beach on Negligence, p. 350; 2 Thompson on Neg. p. 972; Sherman & Redfield, p. 197; Bailey, Masters' Liability, Chap. II; *Johnston v. B. & M. Co.*, 6 Mont. 178.)

When one who is known to be an inexperienced person is put

to work upon dangerous machinery the employer is bound to give him such instructions as will cause him to fully understand the danger attending the employment and the necessity for care. (*Verdelli v. Grays Harbor Commercial Company*, 47 Pac. 364; *Ingerman v. Moore*, 90 Cal. 410, 27 Pac. 306; *Jones v. Mining Co.*, 66 Wis. 277, 28 N. W. 210; *Verdelli v. Grays Harbor Commercial Co.*, 47 Pac. pp. 365-367; *Nadeau v. White River Lumber Co.*, 43 N. W. 1138; *Neilon v. M. & M. Paper Co.*, 44 N. W. 774; *Wolski v. Knapp, Stout & Co.*, 63 N. W. 87; *Arizona Lumber Co. v. Mooney*, 33 Pac. 590-592; *McDougall v. Ashland Sulphite-Fiber Co.*, 73 N. W. 330.)

One who is well acquainted with the use of a mechanical appliance is competent to testify as to whether such an appliance was reasonably adapted for the purpose for which it was used, and also as to its condition at the time of the accident. (Bailey, *Masters' Liabilities*, p. 534 and cases cited; *Alabama Connellsville Coal & Iron Co. v. Pitts.*, So. Rep. 13, 135; *Blogett Paper Co. v. Farmer*, 41 N. H. 389.)

Evidence of similar accidents resulting from the same cause is competent to show dangerous condition of machine. (Bailey on *Masters' Liabilities*, pp. 515 and 520; *Morse, Adm'x, v. Minneapolis & St. L. R. R.*, 16 N. W. 358; *Quinlan v. Utica*, 11 Hun. 217, affirmed, 74 N. Y. 603; *District of Columbia v. Armes*, 107 U. S. 519.)

A wrong reason for a correct ruling will not invalidate the ruling. (*Brown v. Barnes*, 39 Mich. 211; Hayne, *New Trial and Appeal*, p. 384, and cases cited.)

Errors in law are errors in rulings made by the court upon questions presented during the trial. (Hayne, *New Trial and Appeal*, p. 100.)

An irregularity of the court is not an error of law, within the meaning of the law. Errors in law only occur when there are rulings made at the trial upon questions of law. (Hayne, *New Trial and Appeal*, p. 29.)

The statement itself was not the ruling, and if appellant's contention is correct, that the court did not correctly state the

law, it is not an error of law but rather an irregularity on the part of the court. (*McMinn v. Whelan*, 27 Cal. 320.) Our Code has provided that in such case the application for a new trial must be made upon affidavits. (Sections 1171 and 1172, Code of Civil Procedure.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was brought by the plaintiff, Elizabeth Coleman, against the defendants, as copartners operating the Union Steam Laundry, in Butte, Montana, to recover damages for personal injuries received by her while at work in that laundry. The plaintiff claims that she was employed to check the laundry when it came in, to fold it after it had passed through the different processes of laundry, and check it out again; that on February 3, 1896, she was directed by one of the defendants to work on the mangle or ironing machine, feeding the fabrics into it; that while engaged in this occupation, without any negligence on her part, her hand was caught, crushed, and burned in the mangle, by reason of which she suffered great personal injury and damages. She further claims that the defendants were guilty of negligence in keeping for use and permitting to be used an ironing machine which was out of repair, and in an unsafe condition for operation. The answering defendants deny any negligence on their part, plead contributory negligence on the part of the plaintiff, and set up in their answer that the danger incident to the operation of the mangle was one of the risks of the employment, which the plaintiff assumed when she went to work. Upon the trial of the cause, at the close of the plaintiff's testimony, the defendants interposed a motion for nonsuit, which was overruled. Among others the court gave instruction No. 2, which is as follows: "The court instructs the jury that if the jury find from the evidence that plaintiff has been injured by the negligence of the defendants, substantially as set forth in her complaint, then she is entitled to recover from the defendants such an amount as will compensate

her for all the damage proximately caused by the negligence of defendants, whether such damages could be anticipated or not." The jury returned a verdict in favor of plaintiff for \$2,100, and from the judgment and an order denying defendants' motion for a new trial these appeals are prosecuted.

The contention of the plaintiff was that she was employed to do particular work which would not, in any event, bring her into contact with the laundry machinery; that she had had no previous experience in laundry work; that she knew nothing whatever about the machinery; that, as a matter of fact, the mangle in use was out of repair, and in a dangerous condition; that the rollers were not operating evenly; that it was necessary for the person feeding it to place the left hand much nearer the rollers than the right, in order to get the fabrics through; that all of these facts were unknown to her; that there was no guard on the machine to protect the operator; but, notwithstanding her inexperience, and the fact that she had been employed to do other work, she was directed by one of the copartners on the morning of her injury to feed this mangle; that she was not cautioned, instructed, or notified as to the dangerous character of her employment; and that it was without fault on her part that she received the injury. The evidence offered on her behalf tended to prove this contention, and under the rule, well established, that on motion for a nonsuit every fact will be deemed proved which the evidence tends to prove (*State ex rel. Pigott v. Benton*, 13 Mont. 306, 34 Pac. 301; *Morse v. Granite County Commissioners*, 19 Mont. 450, 48 Pac. 745; *Cain v. Gold Mt. Mining Co.*, 27 Mont. 529, 71 Pac. 1004), the evidence should have gone to the jury, and the motion for nonsuit was properly denied.

Complaint is made that the witnesses Lewis and Stanhope, for the plaintiff, were each permitted to state, in answer to a hypothetical question, that, in his opinion, the mangle was out of repair. The contention is that, a description of the machine having been given by other witnesses, the jurors were as well qualified to say whether or not the machine was out of order as

the witnesses whose opinions were given; or, in other words, that this was not an instance where expert testimony should have been received. We are of the opinion, however, that the evidence was properly admitted. We cannot say, as a matter of law, that the jurors were as competent to pass upon the safety of the appliances used as men who had special knowledge, gained from years of experience in handling such machinery. (Lawson, *Expert and Opinion Evidence* (2d Ed.) 78.) In *Lau v. Fletcher*, 104 Mich. 295, 62 N. W. 357, the court had under consideration a personal injury case. The undisputed facts were that a circular saw used in a pulpmill having been broken, the employer took another saw, which had a crack in it, had some repairing done on it, put it in place, and, the employe having been injured when this saw broke, it became a material question as to whether the employer had used reasonable care in providing safe appliances for his employe to use. In support of his contention that he had not been guilty of negligence, the employer offered and had admitted in evidence the opinions of experts to the effect that the saw used was suitable and safe for use, and upon this the supreme court makes this comment: "We think the testimony was properly admitted. It cannot be said that one unfamiliar with the use of such machines is as competent to judge of their safety and fitness as those experienced and skilled in their use, and who have knowledge of their construction."

Upon cross-examination of one of the defendants, plaintiff's counsel sought to show that soon after plaintiff was injured the defendants undertook to put a guard on the mangle, and in ruling upon an objection made by counsel for defendants the district court used this language: "I shall allow the testimony sought to be adduced to go to the jury, believing that, if it can be shown that the defendants here realized that the machine in question was defective, and that they sought, within a few days after the injury to this plaintiff, or after the alleged injury, to cure or remedy such defect, for the reason that it would tend to show that at the time of the injury the machine was then de-

fective. The witness may answer the question." Exception was taken to the language used by the court in the presence of the jury, and it is now urged here that this was prejudicial error. If error was committed, it was because of the irregularity or abuse of discretion on the part of the trial court in thus freely expressing before the jury an opinion upon the probable effect of evidence. If the language of the court so used constituted error, it is one of the designated causes for which a new trial may be granted. (Section 1171, Subd. 1, Code of Civil Procedure.) However, such error can only be shown by affidavit, otherwise it is not properly in the record or before this court (Section 1172, Code of Civil Procedure); and, as the alleged error was not so saved, consideration of the matter is not properly before this court upon this hearing. In this connection it may be said that we are not asked to pass upon the action of the court in admitting the evidence with reference to which the remarks were made.

It is further contended on the part of the defendants that the danger of operating this mangle was a risk incident to the employment of the plaintiff, and one which she assumed when she went to work. The question whether or not the dangers of operating this particular machine were so obvious that even an inexperienced person could not fail to notice and avoid them if exercising ordinary care and prudence, was for the jury's solution under proper instructions.

Particular complaint is made of instruction No. 2, above. Under Section 4330 of the Civil Code, which provides: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not," we are of the opinion that the instruction is not open to the objection made to it. In any event, there is no showing in the record that the defendants asked for any more definite declaration upon the subject.

There is no dispute in the record that the plaintiff was em-

ployed to check and tally the articles of laundry, and in the discharge of this duty she did not come in contact with the laundry machinery at all. In view of the plaintiff's testimony that she knew nothing whatever about the machinery, and the defendant Congdon's testimony that the feeder of the mangle must know her business, and that he did not know whether the plaintiff had any knowledge of the machinery or not, and her further testimony that she was directed by Coddington, one of the co-partners, one of the defendants, and the foreman of the laundry, to feed the mangle on the morning of the accident, and that she received no instructions, notice, or warning, it is pertinent to suggest that the rule that employes assume the risks incident to the employment has no application to the facts of this case as found by the general verdict of the jury. In *Felton v. Girardy*, 43 C. C. A. 439, 104 Fed. 127, the court, after stating the general rule, said: "But when a servant is ordered by one having authority over him to do a temporary work beyond the work which he had engaged to do, and the superior knows, or ought to know, from all the circumstances of the case, that the work which the subordinate is directed to do is of a peculiarly dangerous character, and is aware, or under the circumstances should be aware, that the risks and hazards of the work, or the proper mode of doing the work to avoid the incident risks, are not obvious or known and appreciated by the subordinate, by reason of his youth, incapacity, or inexperience, it is the duty of the superior to caution and instruct such disqualified servant sufficiently to enable him to understand the dangers he will encounter, and how to do the work with safety if he exercise due care himself. (*Leury v. Railroad Co.*, 139 Mass. 580, 2 N. E. 115, 52 Am. Rep. 733; *Cole v. Railway Co.*, 71 Wis. 114, 37 N. W. 84, 5 Am. St. Rep. 201.) * * * The principle is that, if an employer knows that the servant will be exposed to risks and dangers in any labor to which he assigns him, and is aware that the servant is from any cause disqualified to know, appreciate, and avoid such dangers, the dangers not being obvious, the master is guilty of a breach of duty, unless he gives

such reasonable cautions and instructions as should reasonably enable the servant exercising due care to do the work with safety to himself."

It is further contended that the allegations of contributory negligence contained in the defendants' answer, being undenied by a reply, are admitted. At the time the pleadings were prepared and the issues made up, Section 720 of the Code of Civil Procedure was in force, and a reply was required only when the answer contained a counterclaim. This section was afterwards amended by Act of the Sixth Legislative Assembly (Laws of 1899, p. 142), but this was long after the issues were made up in this action.

The other particulars to which our attention has been called do not merit special mention.

The evidence is sufficient to sustain the verdict. We find no error in the record.

The judgment and order appealed from are affirmed.

Affirmed.

MR. JUSTICE MILBURN: I dissent. A jury trying a damage suit wherein a woman is trying to recover compensation for injuries to her hand which has been crushed and mutilated by the defendants' machine, in my opinion, should not be given an instruction such as No. 2 herein. This instruction is not in the language of the Civil Code, Section 4330, quoted by MR. JUSTICE HOLLOWAY. If the instruction, like the section of the Code, be ambiguous, in that it does not say in plain language that the defendant, and not the plaintiff, is referred to as the person who could or could not anticipate the detriment, then it should not have been given. It would not, in my opinion, relieve the situation to say that the section of the Code is as ambiguous as the instruction. The language of the Code is not always a safe and sure means of conveying thought, or of stating the law to a juror. (*State v. Baker*, 13 Mont. 160, 32 Pac. 647; *State v. Shafer*, 26 Mont. 11, 66 Pac. 463; *State v. Felker*, 27 Mont.

451, 71 Pac. 668.) As was said in the *Shafer Case*: "Jurors are not learned in the law. Ordinarily, they have not experience and knowledge sufficient to enable them to draw nice distinctions necessary in the application of legal principles, and, unless the court comes to their assistance, and declares these distinctions so that they may understand and apply them, they are left to grope in confusion and uncertainty." The instruction easily could be understood by a juror as meaning that the woman could recover even though she could reasonably see the danger and anticipate the damage; even if the machine was such as was obviously very dangerous, and certain to cripple her if she undertook to operate it. Jurors cannot be expected, comparing all the instructions, to resolve all doubts as to what they mean, and to draw fine distinctions. I think injustice may in many cases be anticipated if such an instruction be given to twelve men who are asked by a woman to award her compensation for the crippling of her hand.

COLUSA PARROT MINING & SMELTING COMPANY,
APPELLANT, v. BARNARD ET AL., RESPONDENTS.

(No. 1,786.)

(Submitted April 2, 1903. Decided April 11, 1903.)

*Injunction Pendente Lite—Refusal — Appeal—Admission of
Incompetent Evidence—Cross-Examination — Presumptions
—Costs.*

1. Upon an appeal from an order refusing an injunction *pendente lite*, the principal question for consideration is whether, upon the evidence introduced at the hearing, the court below manifestly abused its discretion in refusing the injunction.
2. An admission of incompetent evidence on the hearing of a motion for an injunction *pendente lite* is not ground for reversal in view of the presumption that the court acted only on the competent evidence adduced.
3. In view of the presumption that the court below did not consider incompe-

tent testimony in refusing an injunction *pendente lite*, improper cross-examination of plaintiff's witnesses is not ground for reversal, no injury having been shown.

4. The power to allow costs is purely statutory, and unless some statutory authority exists for their allowance, an allowance thereof is erroneous.
5. An allowance to defendant, on the refusal of a motion for an injunction *pendente lite*, of "all costs," is erroneous.
6. Evidence sufficient to authorize a preliminary injunction or its refusal, is not necessarily sufficient to maintain a like decision upon the final trial on the merits.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

SUIT by the Colusa Parrot Mining & Smelting Company against A. W. Barnard and others. From an order refusing an injunction *pendente lite*, plaintiff appeals. Modified.

Messrs. Roote & Clark, and Mr. Walter M. Bickford, for Appellant.

The deed of a corporation, signed by its proper officers and having the seal of the corporation, is admissible in evidence without further proof. (*Crescent City, etc., Co. v. Simpson*, 77 Cal. 286; *Bliss v. Kaweah C. & I. Co.*, 65 Cal. 502; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543; *Underhill v. Santa Barbara, etc., Co.*, 93 Cal. 300.)

The exclusion of proper evidence is error, which must result in the reversal of the order of the court refusing to grant the injunction. (*Bennett Bros. v. Congdon*, 20 Mont. 208.)

The source of a stream cannot be interfered with. The springs which supply its waters, or the tributaries which conduct portions of the same, are a part of the stream, and their waters before reaching the stream as much a part of it as after the same have commingled with its waters. (*Strickler v. City of Colorado Springs*, 26 Pac. 313; *Ely v. Ferguson*, 27 Pac. 587; *Brown v. Ashley*, 16 Nev. 317; *Cross v. Kitts*, 69 Cal. 217; *Barneich v. Mercy et al.*, 68 Pac. 589.)

If the testimony in the case established that an appropriation or location and use of the waters of Silver Bow and Black Tail Deer creeks was made for the purpose of the reduction plant,

then the plaintiff was entitled to use sufficient water to operate it at any time, although the amount necessary at a later period was greater than the amount at an earlier period by reason of the enlargement of the works, provided, of course, that not more than one thousand inches claimed was used or being used by the plaintiff. (*McDonald v. Lannen*, 19 Mont. 78; *Salazar v. Smart*, 12 Mont. 395; *Murray v. Tingley*, 20 Mont. 260.)

Even if the defendants had a riparian right in the waters of Black Tail Deer creek, which they have not, they could not be permitted to dam and reservoir the water. (*Ferria v. Knipe*, 28 Cal. 340; *Barneich v. Mercy et al.*, 68 Pac. 589.)

The Parrot Silver & Copper Company is a corporation. Its manager had no right or authority to make a verbal lease, or any other kind, without being vested with special delegated authority from the company therefor. (*Butte & Boston Con. Mining Co. v. Montana Ore Purchasing Co.*, 21 Mont. 539.)

The appellant has the right to the use of 300 inches of water, the same being necessary for the operation of its reduction plant as it now exists. (*McDonald v. Lannen*, 19 Mont. 78; *Salazar v. Smart*, 12 Mont. 395; *Murray v. Tingley*, 20 Mont. 260.)

Girton and his successors in interest, the respondents herein, have no right by virtue of any claim of appropriation of use of the water for irrigation purposes to any water beyond the water that was used or necessary for use for irrigating purposes on the Girton homestead. (*Power et al. v. Switzer*, 21 Mont. 523; *Toohey v. Campbell*, 24 Mont. 17.)

The change in use by the respondents deprives the appellant of its right to use the water, and therefore the respondents have no right to interfere with the water in this manner or to maintain said dams or reservoirs or to store any water therein. (*Columbia M. Co. v. Holter*, 12 Mont. 296; *Creek v. Bozeman W. Co.*, 15 Mont. 128; *Gassert v. Noyes*, 18 Mont. 220; *Last Chance Co. v. Bunkerhill Co.*, 49 Fed. 434; Note 8, Vol. 17, p. 504, Am. & Eng. Ency. of Law.)

Mr. Peter Breen, and Messrs. McBride & McBride, for Respondents.

It appears to the respondents that there is but one question involved in this appeal. Does the evidence show an abuse of discretion by the trial court in making the order complained of? If not, then the order of the lower court should be sustained. (*Montana Ore Purchasing Co. v. B. & B. Con. Mining Co.*, 25 Mont. 427; *Anaconda C. M. Co. v. Heinze et al.*, 27 Mont.)

A water right can exist wholly separate and apart from a title to land. (*Smith v. Denniff*, 24 Mont. 20; *Tuohy v. Campbell*, 24 Mont. 13.) Where there is nothing to show that the waters of a spring or well are supplied by any defined flowing stream, the presumption will be that they have their source in the ordinary percolation of the waters through the soil. Percolating waters and those whose sources are unknown, belong to the realty on which they are found. Such a spring belongs to the owner of the land. It is as much his as the earth or minerals beneath the surface, and none of the rules relating to watercourses and diversions apply. (*Willow Creek Irrigation Co. v. Michaelson*, 51 L. R. A. 282, citing *Bloodgood v. Ayers*, 108 N. Y. 400; *Crescent Min. Co. v. Silver King Min. Co.*, 17 Utah, 444; *Kinney on Irrigation*, Sec. 48; *Hanson v. McCue*, 42 Cal. 303; *Southern Pacific R. R. Co. v. Dufour*, 95 Cal. 615, s. c. 30 Pac. 783.)

Water, whether moving or motionless, in the earth is not, in the eye of the law, distinct from the earth. (*Roth v. Driscoll*, 20 Conn. 540; *Hanson v. McCue*, 47 Cal. 303.)

Where percolating waters are gathered in a stream running in a definite channel, no distinction exists between waters so running under the surface or upon the surface of the land. (*Cross v. Kits*, 69 Cal. 222.)

The amount of water which an appropriator is entitled to use—commonly designated as the extent of his appropriation—is a question of fact to be determined by a jury. The right of the prior appropriator in this respect is limited to the amount or extent of his actual appropriation as against subsequent appropriators and claimants; and he cannot, after their subsequent rights have attached, by changing the place or nature of

his use, or by enlarging his works, or otherwise, extend his claim, or increase the amount of water diverted or used, to the prejudice of such subsequent parties. (Pomeroy on Water Rights, Sec. 85, citing, *Nevada Water Company v. Powell*, 24 Cal. 109; *Ortman v. Dixon*, 13 Cal. 33; *Atchison v. Peterson*, 20 Wallace, 514; *MacDonald v. Lannen*, 19 Mont. 82; *Creek v. Bozeman Waterworks Co.*, 15 Mont. 121; *Gassert v. Noyes*, 18 Mont. 222; *Toohey v. Campbell*, 24 Mont. 17; *Power v. Switzer*, 21 Mont. 523; Long on Irrigation, Par. 112, p. 214; *West Point Irr. Co. v. Moroni & Mt. Pleasant Irr. Co.*, 61 Pac. 16; *Saint v. Guerrierio*, 17 Colo. 443, s. c. 30 Pac. 335; *Hillman v. Newington*, 57 Cal. 56.)

MR. COMMISSIONER CLAYBERG prepared the opinion for the court.

This is an appeal from an order refusing to grant an injunction *pendente lite* restraining respondents from interfering with appellant's use of the waters of Blacktail Deer creek, in Silver Bow county, Montana, to which appellant alleges it has the prior right.

Under the former decisions of this court the principal question for consideration is whether, upon the evidence introduced at the hearing, the court below manifestly abused its discretion in refusing the injunction applied for. (*Craver v. Stapp*, 26 Mont. 314, 67 Pac. 937; *Nelson v. O'Neal*, 1 Mont. 284; *Bluebird Mining Co. v. Murray*, 9 Mont. 468, 23 Pac. 1022; *Klein v. Davis*, 11 Mont. 155, 27 Pac. 511; *Cotter v. Cotter*, 16 Mont. 63, 40 Pac. 63; *Anaconda Copper Mining Co. v. Butte & Boston Mining Co.*, 17 Mont. 519, 43 Pac. 924; *Heinze v. Boston & Montana C. C. & S. Mining Co.*, 20 Mont. 528, 52 Pac. 273; *Boston & Montana C. C. & S. Mining Co. v. Montana Ore Purchasing Co.*, 23 Mont. 557, 59 Pac. 919.)

The evidence submitted to the court below in behalf of the respective parties was very contradictory, and a review thereof seems unnecessary to this decision. Much competent testimony was introduced and received in behalf of respondents, tending

to show their prior right to and use of the water in question. The weight of such testimony was for the court below. Therefore this court cannot say that the discretion vested in that court was, upon the testimony adduced, manifestly abused.

All the evidence offered by appellant which was excluded by the court was either immaterial in a preliminary hearing like this, cumulative, or offered by the appellant in its case in chief, instead of in rebuttal, as it should have been. At the close of appellant's case the court overruled a motion made by counsel for respondents to dismiss the application, thereby, in effect, holding that appellant had made a *prima facie* case for the injunction sought. Appellant offered no evidence in rebuttal, but was content to rely upon the case it had made in chief.

In answer to appellant's contention that much irrelevant and incompetent testimony was admitted at the hearing against the objections of its counsel, it seems sufficient to say that presumably the court did its duty, and based its decision upon such of the evidence as was competent, and did not consider such as was incompetent or irrelevant. (*Montana Ore Purchasing Co. v. Butte & Boston Consol. Mining Co.*, 25 Mont. 427-432, 65 Pac. 420.)

Counsel for appellant object to the character of the cross-examination of its witnesses by respondents' counsel. It must be remembered that this hearing was before the court upon a motion. The methods of procedure in such cases are largely within the discretion of the court, and will not be interfered with unless injury is shown. None is shown by appellant, and, in view of the presumption above stated, this court will not interfere.

Appellant further assigns error upon the ruling of the court below in allowing costs to respondents. The language of the order complained of is, "And it is further ordered that the said Butte Ice Company and W. McC. White have and recover from the plaintiff all costs accruing upon the said order to show cause."

The power to allow costs is purely statutory, and therefore,

unless some statutory authority exists for their allowance in matters of this character, the allowance made was erroneous. The statutes of Montana allow costs to the prevailing party upon final judgments rendered in certain actions. (Code of Civil Procedure, Section 1851.) By Section 1853 costs are left to the discretion of the court in other actions. This section also provides that no costs shall be allowed in certain instances. Certain other sections of the chapters on costs allow them in certain other proceedings in court, but there is no provision allowing costs upon motions concerning injunctions. In fact, Section 1861, Code of Civil Procedure, by providing that the losing party upon all motions must pay the other \$10 "as costs," precludes the court from allowing any other costs.

Counsel for respondents seek to justify this allowance under the provisions of Section 880 of the Code of Civil Procedure. This section provides as follows: "Where an injunction order is granted without notice, and the same is afterwards dissolved upon the application of the party enjoined thereby, the court or judge to whom the application to dissolve is made, may award as costs of the application against the plaintiff, and in favor of the party applying, such sum as to the court or judge may appear just, not less than ten dollars, nor more than one hundred dollars." We think the provisions of this section are inapplicable to the present case. The record discloses no application on the part of respondents to dissolve any "injunction order." Again, in the application of the provisions of this section, the court or judge must fix a definite amount, not less than \$10 or more than \$100, which he awards "as costs" in favor of the person making the application. No sum is fixed here, but all costs are allowed. It is very apparent from the reading of the order made that the court did not have in mind, and did not intend to apply, the provisions of either Sections 880 or 1861, *supra*, when he made the order appealed from.

We deem it proper to say that this court does not decide, or even intimate an opinion, as to whether the evidence offered would warrant a decision against the plaintiff on a trial of the

case on its merits. The rule is well settled that evidence sufficient to authorize a granting of a preliminary injunction or to warrant the refusal thereof may not be sufficient to maintain a like decision upon a final trial of the action on its merits. (*Craver v. Stapp*, 26 Mont. 314, 67 Pac. 937; *Maloney v. King*, 25 Mont. 188, 64 Pac. 351.)

We therefore conclude that the court erred in allowing costs to respondents, and that the order appealed from ought to be modified in that regard by striking out the provisions for costs, and, as so modified, be affirmed.

PER CURIAM.—For the reasons contained in the foregoing opinion, the order appealed from is affirmed, with the modification suggested.

STATE, RESPONDENT, v. HARDEE, APPELLANT.

(No. 1,879.)

(Submitted April 3, 1903. Decided April 11, 1903.)

Homicide — Evidence — Proof of Venue—Homicidal Monomania—New Trial—Newly Discovered Evidence—Cumulative Evidence.

1. In a prosecution for murder, evidence considered, and held to show that the crime was committed in the county alleged in the indictment.
2. In a prosecution for murder, evidence considered, and held to show too much deliberation to be the result of any sudden impulse, and to be incompatible with the theory that the defendant was afflicted with homicidal monomania.
3. Where, in a prosecution for murder, the insanity of defendant was placed in issue, in support of which defendant called witnesses who testified, and the facts to be proved by newly discovered evidence were merely cumulative on that issue, and were not such as to make it clearly probable that a different result would follow another trial, nor was it shown that they could not have been produced on the former trial by the exercise of reasonable diligence, a new trial was properly refused.

Appeal from District Court, Valley County; John W. Tattan, Judge.

WILLIAM E. HARDEE was convicted of murder. From a judgment sentencing him to death, and from an order denying him a new trial, he appeals. Affirmed.

Mr. George E. Hurd, and Messrs. Nolan & Loeb, for Appellant.

If there is any evidence to establish the venue and the question arises as to its sufficiency, it cannot be considered upon an appeal from the judgment, but where there is no evidence its absence becomes a question of law and is reviewable upon such an appeal. (Penal Code, Section 2321; *Emerson v. Eldorado Ditch Co.*, 18 Mont. 247; *Withers v. Kemper*, 25 Mont. 432.)

In criminal prosecutions the venue is a jurisdictional fact and must be proved. (*Brooks v. State*, 120 Ala. 386; *Forehand v. State*, 53 Ark. 46; *Moore v. People*, 150 Ill. 405; *Harlan v. State*, 134 Ind. 339; *State v. Young*, 99 Mo. 284; *Early v. Com.*, 93 Va. 765.)

The proof of venue must affirmatively appear from the record on appeal. (*Hite v. State*, 9 Yerger, 357; *Terry v. State*, 22 Tex. App. 679.)

When a bill of exceptions purports to set out all the evidence and the venue is not established, judgment will be reversed. (*People v. Griffith*, 122 Cal. 212; *Cathorn v. State*, 63 Ala. 157; *Harrison v. State*, 3 Tex. App. 558.)

The affidavits as to newly discovered evidence are uncontradicted. Under the peculiar conditions of this case the affidavits disclose a meritorious case where the application for a new trial upon this ground should be favorably considered. (Thompson on Trials, Sec. 2762; *State v. Brooks*, 23 Mont. 146; *Anderson v. State*, 43 Conn. 514; *Dennis v. State*, 103 Ind. 142.

Mr. James Donovan, Attorney General, for the State.

A new trial will not be granted on the grounds of newly dis-

covered evidence unless such evidence is material and would be likely to change the result, if the motion were allowed. (*Territory v. Bryson*, 9 Mont. 42, 22 Pac. 147; *People v. Demasters*, 109 Cal. 608; *Shafer v. Willis*, 124 Cal. 36; *People v. Warren*, 130 Cal. 683; *Davis v. State*, 51 Neb. 360; *Linscott v. Insurance Co.*, 88 Me. 497; *Smith v. State*, 143 Ind. 685.)

If the new evidence is cumulative, a new trial will not be granted. (*Morse v. Swan*, 2 Mont. 307; *People v. Kloss*, 115 Cal. 567; 1 Bish. New Criminal Procedure, Sec. 1279; *Norfolk v. Johnakin*, 94 Va. 285; *Sisler v. Shaffer*, 43 W. Va. 769; *Condan v. Mead*, 172 Ill. 13; *Allbright v. Hanna*, 103 Ia. 98; *People v. Brittan*, 118 Cal. 469; *Kuhlman v. Burns*, 117 Cal. 409; *Niosi v. Empire Steam Laundry*, 117 Cal. 257.)

A person seeking a new trial on the ground of newly discovered evidence must show that he could not have discovered the evidence and produced it on the trial by any reasonable diligence on his part. Strict proof must be made on this point, and facts, not conclusions, stated in the moving affidavits from which the court may draw the conclusion that due diligence was used. (*Bradley v. Norris*, 67 Minn. 48; *Lukens v. Garrett*, 2 Kans. App. 722; *Butter v. Vassault*, 40 Cal. 74; *People v. Ching Hing Chang*, 74 Cal. 389; *People v. Urquidas*, 96 Cal. 239.)

The moving party must show by his own affidavit that the new evidence was not known to him at the time of the trial. Upon that question the affidavits of other persons are not sufficient. (*Arnold v. Skaggs*, 35 Cal. 684.)

An application for a new trial on the ground of newly discovered evidence should be regarded with distrust and disfavor. (*People v. Howard*, 74 Cal. 547; *People v. Sutton*, 73 Cal. 243; *Tibet v. Tom Sue*, 125 Cal. 544.)

And a party who relies upon that ground must make a strong case, both in respect to diligence on his part in preparing for the trial, and as to the truth and materiality of the newly discovered evidence, and that, too, by the best evidence

obtainable, and if he fails in either respect his motion must be denied. (*People v. Freeman*, 92 Cal. 359.)

The granting of a new trial on this ground is largely a matter of discretion, the exercise of which will not be disturbed by the appellate court except in the case of an abuse clearly disclosed by the record. (*O'Rourke v. Vennekohl*, 104 Cal. 254; *Heintz v. Cooper*, 104 Cal. 668; *People v. Rushing*, 130 Cal. 449; *People v. Mitchell*, 129 Cal. 584.)

MR. COMMISSIONER POORMAN prepared the opinion for the court.

On the 26th day of September, 1901, an information was filed against the defendant in Valley county, charging him with the crime of murder in the first degree, for killing Charles Snearly in that county.

The defendant was apprehended and arrested on or about the 11th day of September, and placed in jail at the county seat of said county on or about the 12th day of the same month, where he remained continuously until the time of his trial. On November 27, 1901, counsel for the defense called the attention of the trial court to the fact that the defendant was, in his judgment, mentally incompetent to furnish his counsel with any of the facts necessary in the preparation of his defense. The court thereupon made an order requesting that Drs. Hoyt, Clay, Meminger, and Atkinson, four regularly licensed and practicing physicians in said county, examine the defendant as to his sanity. This examination was made on the 28th day of November, and the physicians so appointed reported to the court that they found the defendant physically broken down from the use of morphine and opium, but that he was at the time of said examination mentally sound. The trial was then proceeded with, the defense being insanity; it being sought to be shown that the defendant's mental derangement took the form of homicidal monomania. A verdict of guilty of murder in the first degree was rendered. Judgment sentencing de-

fendant to death was entered. The motion was then made for a new trial on the ground of newly discovered evidence, which motion was overruled. From this judgment, and from the order overruling the motion for a new trial, the defendant appeals.

Two assignments of error are contained in the record: First, that the record fails to show that the offense was committed in Valley county; second, that the court erred in refusing to grant a new trial on the ground of newly discovered evidence.

1. The record before us contains all the evidence in the cause. On the first assignment of error, we find these material facts established: Mrs. Alice Smith, a witness on behalf of the state, testifies: "I am the wife of J. P. Smith, called 'Doc Smith.' My residence is about eighteen or twenty miles north of Culbertson, in this county and state. I was at home at my house on the 9th of September of this year, and know the defendant, William E. Hardee. I know Charles Snearly." The witness then proceeds to relate the circumstances of the killing, which occurred there on the evening of that day. She further says that she started to Culbertson that evening with the men who were taking the deceased in, and continued with them until she met her husband, when she came back home with him. Fred Wagar, another witness on the part of the state, testifies: "My home is in North Dakota. The early part of last September I was in the state of Montana, on Doc Smith's ranch, near Culbertson, in this county." The witness then proceeds to detail the circumstances of the killing as it occurred there at Smith's place on the 9th day of September. J. P. Smith testifies: "My name is J. P. Smith. I live fifteen miles from Culbertson. Mrs. Smith, a witness in this case, is my wife. I live north of Culbertson, in Valley county, state of Montana. On or about the 9th of September of this year I was at Culbertson. I went home that night or the next morning. On the way home I met the wagon bringing Snearly into town. I went on home, and my wife did also. * * * When I got home that night I don't think I went into that west

bedroom. I think I went in first next morning. I think Mr. Ford was with me. There was a whole lot of blood in there." The defendant also testifies, after repeatedly stating that he was at Doc Smith's ranch: "I had trouble with Snearly. I killed him. I do not know when I killed him. I killed him because he jumped onto me, I guess, at Doc's." This testimony clearly establishes the fact that this homicide was committed at the ranch of J. P. Smith, in Valley county, Montana.

2. The defendant's contention that he is entitled to a new trial on the ground of newly discovered evidence, establishing the fact that he was insane at the time of the commission of this offense, calls for a brief review of the actions of the defendant at the time of, and subsequent to, the killing. It appears from the testimony: that the defendant and the deceased came to the ranch of Mr. Smith some time in August, 1901, and, after remaining there several days, went away. They returned there on the morning of the 9th of September. The defendant's first inquiry of Mrs. Smith was whether the deceased had said anything to her about their trip. The defendant then told Mrs. Smith that they had been out after some horses, and were driving them to market; that they had been without food for some time; that he had shot a chicken; and that the boy (referring to the deceased, who was about 17 years of age) was pretty hungry, and insisted upon stopping to cook the chicken; that the defendant insisted upon continuing their drive of the horses until 12 o'clock, but that, at the instance of Snearly, they stopped and cooked the chicken, and while they were doing it the horses got away from them. This made the defendant very angry, and he threatened to kill Snearly, and stated that he did not kill him at that time because the boy begged so hard, and he thought he would wait until he got where he could have a decent burial. That in the afternoon of September 9th the defendant, the deceased, and one Jackson went hunting, returning to Mr. Smith's place in the evening. That the deceased then busied himself with cleaning and oiling a revolver, and, after he had finished, rubbed his oily hands

through the hair of the defendant. This did not appear to anger the defendant at the time, and soon after the defendant, who was sitting down, got up, took the revolver from where the deceased had laid it, carried it out into the kitchen, and laid it down. The revolver was unloaded. The deceased and defendant then went into the bedroom, where they apparently had some disagreement. The defendant soon come out in a hurried manner, rushed into the kitchen, picked up the pistol, and, on his way back to the bedroom, picked up a double-barreled shotgun. Passing into the room where the deceased was standing, he threw the pistol on the floor at the feet of the deceased, and said, "Pick it up, if you have any nerve," and almost immediately fired one barrel of the shotgun at the deceased, inflicting the wound from which deceased died on September 11, 1901. Defendant remained there for some little time, and every few minutes would ask the deceased if he wanted the other barrel, and said to the deceased, "I promised this to you." The deceased replied, "Yes; but I did not think you would do it," when defendant said, "You ought to know that I am a man of my word. You found out that I was." A little later, when those present proposed taking the wounded man to Culbertson, the defendant objected, and said, "You had better not take him until the coroner comes," but afterwards gave his consent. Snearly repeatedly called for morphine, and defendant finally gave him some that he had with him; and afterwards, when Snearly asked for more morphine, he gave a spoonful of it to Mrs. Smith, told her to give it to Snearly, and said, "That will fix him, sure." Defendant then ordered the men who were present to saddle up the best horse Doc (meaning Smith) had, which defendant then mounted and rode away, following the wagon in which they were conveying Snearly for some distance. Prior to leaving the Smith residence he asked one of the men if Snearly was shot bad, and on being informed that he was, and that he could not live, defendant said: "That is good enough for me. If I thought he was not killed, I would shoot him again." After Snearly had been

placed in the wagon, he asked to have his boots removed. The defendant then remarked: "That is good enough for me. He is gut-shot, and will die before we get him to town." The next night after the killing, defendant, while at the house of Mr. Olson, heard Mr. MacDonald, who had just come from Culbertson, remark that the boy (meaning the deceased) was dead, or not expected to live. Defendant immediately asked: "Did the boy say anything—tell anything?" On being informed that he had not, he expressed his satisfaction, and said he hoped that he would live. Defendant was taken to jail, and, being addicted to the use of opium, was placed under the care of the county physician. Since the defendant has been in jail he has frequently talked to the sheriff about the killing of Snearly, and expressed himself as being very sorry, and about "feeling very badly" on account of it. On the trial of the case, the defendant, in speaking of deceased, says: "I have seen him down there lots of times in the jail. He has been there lots of times, and I have seen him once in a while. I saw him two or three days ago, and last night he just came there and looked in and went away. I told him to get away." Further on the defendant, in testifying, says: "Since I have been in jail I have thought about this Snearly matter a great deal. I dream about it every night. I see Snearly in my dreams. He won't talk to me. I talk to him sometimes."

The circumstances and facts attending this homicide show too much deliberation to be the result of any sudden impulse, but appear, rather, to be the result of anger occasioned by the deceased causing the defendant to lose the horses, and a fear on the part of defendant that the deceased might make some remark relative to some past transaction. This is evident from the solicitude of the defendant as to whether or not the deceased had "said anything—told anything." The fact that the defendant has evidently been brooding over this affair, and has expressed himself as very sorry that he had killed Snearly, is not compatible with the theory that the defendant was at the time of the killing afflicted with homicidal monomania. The

testimony of the physicians on this point is to the effect that if a man is a homicidal monomaniac, and in that condition kills another, he would not afterwards be sorry or grieve over his act. It is further in evidence that Dr. Hoyt saw and examined the defendant within three or four days after the commission of the homicide, and that the defendant has been in his care at all times since; that he has never been able to detect any signs of insanity about defendant. Defendant was further examined by four physicians the day prior to his trial, who reported that he was at that time mentally sound. It is further stated in the testimony of the physicians that, if defendant had been the victim of mania or of insanity in any of its forms, it would not have passed away in the interval between the killing and the time when he was placed under the care of Dr. Hoyt. Sheriff Griffith also testified that during the time that the defendant has been in his care he has detected no signs of insanity, that the defendant has been at all times able to converse upon matters, and that it was only when placed upon the witness stand to give testimony in this case that his memory failed him. Mr. and Mrs. J. P. Smith also testified that they knew the defendant—had known him for some time prior to the homicide; that he had frequently been about their home; that they had never thought him insane, nor detected signs of insanity about him. One of the physicians testified that at the examination on the 28th of November the defendant appeared to be afflicted with melancholia, which fact is also a refutation of the homicidal maniac theory, for it is a part of the evidence of the physicians that melancholia is a milder form of insanity, and that a person afflicted with homicidal monomania would not afterwards pass into a condition of melancholy.

The facts which defendant wishes to prove by his newly discovered evidence are cumulative, tending to prove the allegations of mental incapacity, which became an issue on the trial, and in support of which defendant called witnesses who testified, and are not such as to make it clearly probable that a different result would follow another trial; nor does it appear

that the testimony could not have been produced upon the former trial by the exercise of reasonable diligence, for the testimony produced upon the former trial shows that the defendant was mentally capable at all times from the day when he shot Charles Snearly until the time of his trial of giving his counsel all the required information necessary in the preparation of his defense. (*Territory v. Bryson*, 9 Mont. 32, 22 Pac. 147; *State v. Brooks*, 23 Mont. 146, 57 Pac. 1038.)

It appears from the record that the defendant had a fair and impartial trial, that he was ably defended, and that the court did not in any manner abuse its discretion in overruling the motion for a new trial.

We therefore recommend that the judgment and order appealed from be affirmed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment and order are affirmed.

MR. JUSTICE MILBURN did not hear the argument in this case, and therefore takes no part in this decision.

LESS, RESPONDENT, v. CITY OF BUTTE, APPELLANT.

(No. 1,508.)

(Submitted April 3, 1903. Decided April 11, 1903.)

*Municipal Corporations — Streets — Establishing Grades —
Damages to Property—Compensation—Constitution—Eminent Domain.*

28	27
128	86
128	38
28	27
40	451

1. Section 14 of Article III of the Constitution is both mandatory and prohibitory, and it is also self-executing.
2. *Obiter*: The constitution (Article III, Section 14) does not authorize a remedy for every diminution in the value of property that is caused by public improvements; the damages for which compensation is to be made

being a damage to the property itself, and not including mere infringement of the owner's personal pleasure or enjoyment.

3. Under Constitution, Article III, Section 14, declaring that private property shall not be "taken or damaged" for public use without just compensation, a landowner is entitled to compensation for damages owing to the grading of a street on which his property abuts, in accordance with a grade fixed by city, notwithstanding the fact that such grade is the first one ever fixed.

Appeal from District Court, Silver Bow County; John Lindsay, Judge.

ACTION by Andrew Less against the city of Butte. From a judgment for plaintiff, defendant appeals. Affirmed.

STATEMENT OF THE CASE BY THE COMMISSIONER WHO
PREPARED THE OPINION.

On June 8, 1881, the owners of the ground included in the present Leggatt & Foster addition to the city of Butte platted the same in lots and blocks, with intervening streets, and filed a plat thereof with the county clerk of Silver Bow county, Montana. East Broadway street, designated upon the plat, is an extension of Broadway street in said city. On March 25, 1893, this addition was regularly annexed to the city of Butte, and East Broadway was dedicated to the city as a public street. Some time in the year 1893 the plaintiff became the owner of lot 9 in block 4, fronting on East Broadway in said addition, built upon his lot a two-story house, and made other improvements thereon, relying upon the grade of the street as it then existed, and in conformity to the street as the same was then traveled and used.

By an ordinance passed and approved July 17, 1895, a grade line was established along Broadway street, across and over the Leggatt & Foster addition, and in front of the lot owned by plaintiff. The grade thus established was the first and only grade established by the corporate authority of the city upon the street in front of the lot of plaintiff. Thereafter, on April 21, 1897, the city council passed a resolution ordering Broadway street excavated and graded from the east side of

Oklahoma avenue to the east side of Gaylord street, in front of plaintiff's property, to said grade line.

The city did not agree, or attempt to agree, with the plaintiff, upon the amount of damages which he would sustain to his premises on account of such change of grade and excavation, and did not pay or tender to plaintiff anything on account thereof, and did not appoint any freeholders to make an appraisalment of the damages or of the benefits which would result to the plaintiff's premises by reason of the change of grade and excavation of the street; but pursuant to said resolution the city did, during the summer of the year 1897, proceed to grade and excavate the street so as to make the same conform to the grade line so established as aforesaid. The street in front of plaintiff's premises was thus graded and excavated to the depth of about seven feet, and the sidewalk in front of the plaintiff's house was located at about the same depth, in order to conform to the street as graded.

The plaintiff then presented his claim to the city council, demanding \$500 damages because of the grading and excavation mentioned, but the city refused to pay the same, or any part thereof. The plaintiff thereupon began this suit. The case was tried upon an agreed statement of facts and upon oral testimony. At the conclusion of plaintiff's case the defendant moved the court for a nonsuit upon the ground "that the grade on Broadway street adjoining the property of the plaintiff was the first and only grade ever established on Broadway street, and under the laws of Montana in force at the time the city of Butte had a right to establish said grade to reduce the street in conformity to the grade established, and is not liable to the plaintiff by reason of any damages that he may have sustained by reason of the first establishment of the grade."

The court overruled the motion, and gave judgment for plaintiff in the sum of \$500, as prayed for in his complaint. From this judgment the defendant appeals.

Mr. Edwin M. Lamb, for Appellant.

The establishment of a grade and the change of grade from the natural grade to such established grade is not within the meaning of Section 4940 of the Political Code. (Section 4800, Political Code; *Gardnier v. Town of Johnston*, 12 Atl. 891; *Aldrich v. Aldermen of Providence*, 12 R. I. 241.)

The establishment of a grade line and the change of the grade of a street to conform thereto, which lessens the value of abutting property, is not such damage by the public to private property as comes within the meaning of Section 14 of Article III of the Constitution. (Dillon on Municipal Corporations, 4th Ed., Secs. 995a, 995b, 995c; *Callender v. March*, 1 Pick. 431; *City of Denver v. Bayer* (Colo.), 2 Pac. 7; *City of Denver v. Vernia* (Colo.), 8 Pac. 659; *Rigney v. City of Chicago*, 102 Ill. 80; *Reardon v. City of San Francisco* (Cal.), 6 Pac. 326; *The Julia Building Association v. Bell Tel. Co.*, 88 Mo. 274.)

Messrs. McHatton & Cotter, for Respondent.

Section 14 of Article III of the Constitution changes the common law, gives a right which did not exist at common law, is self-executing, and entitles the plaintiff in this case to recover. (*Reardon v. San Francisco*, 66 Cal. 492; *Eachus v. Los Angeles C. Ry.*, 103 Cal. 614, 37 Pac. 750; *Holland v. U. P. Ry. Co.*, 14 Fed. 394; *Blanchard v. Kansas City*, 16 Fed. 444; *McElroy v. Kansas City*, 21 Fed. 257; *Rigney v. City of Chicago*, 102 Ill. 64; *Chicago v. Taylor*, 125 U. S. 161; *Harman v. City of Omaha*, 23 N. W. 503; *Henderson v. McLean*, 39 L. R. A. 345; *Smith v. Kansas City Ry. Co.*, 98 Mo. 20; *Sheedy v. Kansas City Cable Co.*, 94 Mo. 575; *Searles v. City of Lead*, 73 N. W. 101, 39 L. R. A. 345; *Brown v. City of Seattle*, 31 Pac. 313; *Lewis v. City of Seattle*, 32 Pac. 786; 6 A. & E. Ency. of Law, 544, Note 2; *Davis v. Mo. Pac.*, 119 Mo. 180, 24 S. W. 777, see authorities cited p. 779; *Hickman v. City of Kansas*, 120 Mo. 110, 23 L. R. A. 658, and cases cited; *Groff v. Philadelphia*, 150 Pa. 594; *New Brighton v. United Presby. Church*, 96 Pa. 331; *Wirth v. City of Spring-*

feld, 78 Mo. 107; *City of Elgin v. Eaton*, 83 Ill. 535; *Bartlett v. Tarrytown*, 52 Hun. (N. Y.) 38; *McCall v. Saratoga Spgs.*, 56 Hun. (N. Y.) 639, 121 N. Y. 704, 'affirming 29 N. Y. SR. 699; *In re Church of Our Lady of Mercy*, 22 N. Y. SR. 967, 10 N. Y. Supp. 683; *Ft. Worth v. Howard*, 3 Tex. Civ. App. 537, 22 S. W. 1059; *O'Brien v. Philadelphia*, 150 Pa. 589; *Jones v. Borough of Bangor*, 144 Pa. St. 638; *City of Bloomington v. Pollock*, 141 Ill. 351, 31 N. E. 146; *Blair v. Charleston*, 35 L. R. A. 852.)

MR. COMMISSIONER CALLAWAY prepared the opinion for the court.

By the common law municipal corporations were not held liable for consequential damages resulting to property owners by reason of changes in street grades. The municipal authorities might change or alter the grades of public thoroughfares at will, and the adjoining owners had no redress. It was considered that, public improvements being for the good of the body politic, and always being in contemplation, the individual purchased his city or town property charged with knowledge that changes might be made as required by public necessity and convenience. So, too, when one platted a townsite, and dedicated certain portions thereof to the public for streets, he and his grantees were presumed to contemplate the changes which would necessarily result from public improvements. The rule *damnum absque injuria* was held to apply to all such cases, unless the injury could be shown to have resulted from the negligent or improper manner in which the work was done. Such is the doctrine asserted in *Callender v. Marsh*, 1 Pick. 418, and other cases cited by appellant.

The framers of our Constitution abrogated this harsh rule by Section 14, Article III, which reads as follows: "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for the owner." It seems very clear to us that this section was

drafted in the broad language stated for the express purpose of preventing an unjust or arbitrary exercise of the power of eminent domain. It overturns the doctrine that one owning city or town property must continually live in dread of the changing whims of successive boards of aldermen. Constitutions which provide that "private property shall not be *taken* for public use without just compensation" are but declaratory of the common law, and contemplate the physical taking of property only. Under constitutions which provide that property shall not be "taken or damaged" it is universally held that "it is not necessary that there be any physical invasion of the individual's property for public use to entitle him to compensation." (*Root v. Butte, Anaconda & Pacific Ry. Co.*, 20 Mont. 354, 51 Pac. 155, and cases cited.) The owner of a city lot has "a kind of property in the public street for the purpose of giving to such land facilities of light, of air, and of access from such street." (*Bohm v. Metropolitan El. Ry. Co.*, 129 N. Y. 576, 29 N. E. 802, 14 L. R. A. 344.) "These easements are property, protected by the constitution from being taken or damaged without just compensation." (*Root v. Butte, Anaconda & Pacific Ry. Co.*, *supra*; *Chicago v. Taylor*, 125 U. S. 161, 8 Sup. Ct. 820, 31 L. Ed. 638; *Eachus v. Los Angeles Consol. El. Ry. Co.*, 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149; *Rigney v. City of Chicago*, 102 Ill. 64; *Brown v. City of Seattle*, 5 Wash. 35, 31 Pac. 313; *Lewis v. City of Seattle*, 5 Wash. 741, 32 Pac. 794; *Hickman v. City of Kansas*, 120 Mo. 110, 25 S. W. 225, 23 L. R. A. 658, 41 Am. St. Rep. 684; *City of Fort Worth v. Howard*, 3 Tex. Civ. App. 537, 22 S. W. 1059; *Harmon v. City of Omaha*, 17 Neb. 548, 23 N. W. 503, 52 Am. Rep. 420; *Schaller v. City of Omaha*, 23 Neb. 325, 36 N. W. 533.) Moreover, it may frequently occur that "the consequential damage may impose a more serious loss upon the owner than a temporary spoliation or invasion of the property." (*City of Atlanta v. Green*, 67 Ga. 386.)

But the appellant insists that it should not be held liable in this action for the reasons stated in its motion for a nonsuit.

The first point is that the appellant cannot be held liable because the grade complained of is "the first and only grade ever established on Broadway street." The constitution does not distinguish between the first grade and subsequent ones. It provides against the damage occasioned in either case. (*Searle v. City of Lead*, 10 South Dakota, 312, 73 N. W. 101, 39 L. R. A. 345; *City of Bloomington v. Pollock*, 141 Ill. 346, 31 N. E. 146; *Eachus v. Los Angeles Consol. El. Ry. Co.*, 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149.) The mischief to be remedied may be greatest in the first instance. (*McCall v. Village of Saratoga Springs* (Sup.), 9 N. Y. Supp. 170; *Id.*, 121 N. Y. 704, 24 N. E. 1100.) The first grade of Broadway street was that provided by nature, and the alteration made by appellant was as much a change of grade as if the change had been made from a grade previously established by the authorities. (*Hendrick's Appeal*, 103 Pa. 358; *O'Brien v. Philadelphia*, 150 Pa. St. 589, 24 Atl. 1047, 30 Am. St. Rep. 832; *McCall v. Village of Saratoga Springs* (Sup.), 9 N. Y. Supp. 170; *Id.*, 121 N. Y. 704, 24 N. E. 1100; *Blair v. City of Charleston*, 43 West Va. 62, 26 S. E. 341, 35 L. R. A. 852, 64 Am. St. Rep. 837.)

As to whether the appellant is liable "under the laws (statutes) of Montana in force at the time" is wholly immaterial. Section 14, Article III, of the Constitution, is both mandatory and prohibitory. It is self-executing, and requires no legislation to rouse it from dormancy. (*Searle v. City of Lead*, 10 South Dakota, 312, 73 N. W. 101, 39 L. R. A. 345; *Hickman v. City of Kansas*, 120 Mo. 110, 25 S. W. 225, 23 L. R. A. 658, 41 Am. St. Rep. 684; *Harmon v. City of Omaha*, 17 Neb. 548, 23 N. W. 503, 52 Am. Rep. 420.)

While it is doubtless true that the constitution does not authorize a remedy for every diminution in the value of property which is caused by public improvement, the damages for which compensation is to be made being a damage to the property itself, and not including mere infringement of the owner's personal pleasure or enjoyment (*Eachus v. Los Angeles Consol.*

El. Ry. Co., supra), in the case at bar it is practically conceded that respondent is entitled to damages in the amount of the judgment rendered provided the appellant is liable at all.

We think the operation of this section of the constitution ought not to be restricted. The declarations of constitutions are placed therein to be obeyed, and are not to be "frittered away by construction." In *McElroy v. Kansas City* (C. C.), 21 Fed. 257, Mr. Justice Brewer, in passing upon a similar constitutional provision, said: "I think, too, in these days of enormous property aggregation, where the power of eminent domain is pressed to such an extent, and when the urgency of so-called public improvements rests as a constant menace upon the sacredness of private property, no duty is more imperative than that of the strict enforcement of these constitutional provisions intended to protect every man in the possession of his own. * * * Such constitutional guaranty needs no legislative support, and is beyond legislative destruction."

We are of the opinion that the judgment ought to be affirmed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment is affirmed.

HOLLAND, RESPONDENT, v. CITY OF BUTTE, APPELLANT.

(No. 1,509.)

(Submitted April 8, 1903. Decided April 11, 1903.)

Municipal Corporations—Streets—Changing Grade—Damages.

Judgment affirmed upon the authority of *Less v. City of Butte*, ante, 27.

Appeal from District Court, Silver Bow County; John Lindsay, Judge.

ACTION by Michael B. Holland against the city of Butte, Montana. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Mr. E. M. Lamb, for Appellant.

Messrs. McHatton & Cotter, for Respondent.

PER CURIAM.—As agreed in open court by counsel for appellant and respondent, practically the same questions are involved in this case as in the case of *Less v. City of Butte*, decided this day. Therefore, on the authority of the last mentioned case, the judgment of the district court is affirmed.

O'DONNELL ET AL., RESPONDENTS, v. CITY OF BUTTE,
APPELLANT.

(No. 1,511.)

(Submitted April 3, 1903. Decided April 11, 1903.)

Municipal Corporations—Streets—Changing Grade—Damages.

Judgment affirmed upon the authority of *Less v. City of Butte*, ante, 27.

Appeal from District Court, Silver Bow County; John Lindsay, Judge.

ACTION by William O'Donnell and another against the city of Butte, Montana. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Mr. E. M. Lamb, for Appellant.

Messrs. McHatton & Cotter, for Respondents.

PER CURIAM.—As agreed in open court by counsel for appellant and respondents, practically the same questions are involved in this case as in the case of *Less v. City of Butte*, decided this day. Therefore, on the authority of the last mentioned case, the judgment of the district court is affirmed.

HANLEY, RESPONDENT, v. CITY OF BUTTE, APPELLANT.

(No. 1,520.)

(Submitted April 3, 1903. Decided April 11, 1903.)

Municipal Corporations—Streets—Changing Grade—Damages.

Judgment affirmed upon the authority of *Less v. City of Butte*, ante, 27.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

ACTION by Annie Hanley against the city of Butte, Montana. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Mr. E. M. Lamb, for Appellant.

Messrs. McHatton & Cotter, for Respondent.

PER CURIAM.—As agreed in open court by counsel for appellant and respondent, practically the same questions are involved in this case as in the case of *Less v. City of Butte*, decided this day. Therefore, on the authority of the last mentioned case, the judgment of the district court is affirmed.

SNELL, PLAINTIFF, v. WELCH ET AL., DEFENDANTS.

(No. 1,941.)

(Submitted April 23, 1903. Decided April 24, 1903.)

*Supreme Court—Original Jurisdiction—Propriety of Exercise
—Injunction—Constitutionality of School Text-Book Law.*

The supreme court will not entertain an original proceeding to test, by an injunction to restrain the state text-book commission from advertising for bids, the constitutionality of a statute relating to a uniform system of text-books, and requiring the books contracted for to bear "union labels;" no pressing necessity appearing for a speedy determination of the question, the court calendar being three years in arrears, and the matter being one which should ordinarily, and in the first instance, be submitted to the district court; especially where it is apparent that the interests of the public, so far as they are involved, may be as well protected if the parties are left to pursue the usual course.

ORIGINAL SUIT by Charles H. Snell against W. W. Welch, state superintendent of public instruction, and others, constituting the state text-book commission. Dismissed.

Mr. Edward Horsky, Mr. Robert B. Smith, and Mr. E. A. Carleton, for Plaintiff.

Mr. James Donovan, Attorney General, for Defendants.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought by complaint filed in this court to obtain an injunction to restrain the defendant W. W. Welch, superintendent of public instruction of the state, and the said Welch and the other defendants as the state text-book commission, created by an Act of the Eighth Legislative Assembly known as "Senate Bill 54" (Chapter CXXII, Laws of 1903), from proceeding to advertise for bids for contracts to supply a uniform system of text-books for use in the public schools of the state, as authorized and required by the provisions of the said

Act. The court, upon application, permitted the complaint to be filed, reserving for consideration the question whether the circumstances were such as required it to assume jurisdiction of the cause in the first instance.

The action involves the constitutionality of a provision in Section 13 of the Act requiring all books contracted for by the commission to bear "union labels,"—that is, to be published by firms entitled to use and using the label of the printers' union. After consideration, the court concludes that no urgent necessity is shown to exist why it should entertain the action in the first instance. The calendar of this court is much in arrears. In the absence of some pressing necessity, we do not think we should postpone other causes which have been awaiting decision—some of them for as much as three years—in order to permit parties to reach a speedy decision upon a matter which should ordinarily, and in the first instance, be submitted to the district court. This is especially true of cases like the present, when it is apparent that the interests of the public, so far as they are involved, may be protected as well if the parties are left to pursue the usual course.

The action is therefore dismissed.

Dismissed.

MANTLE, RESPONDENT, v. LARGEY, APPELLANT.

(No. 1,798.)

(Submitted April 11, 1903. Decided April 27, 1903.)

Appeal—Reversal of Order for New Trial—Stipulation—Effect.

Where, after an appeal from an order granting a new trial, the parties, in pursuance of a settlement which they have reached, file a stipulation requesting a reversal of the order, that disposition of the case will be made (when

there is no question as to the district court's jurisdiction in the case), though it is not apparent that, upon an examination of the record, affirmance might not be proper.

MR. JUSTICE MILBURN dissenting.

Appeal from District Court, Silver Bow County; E. W. Harney, Judge.

SRIT by Lee Mantle against Lulu F. Largey, administratrix of the estate of P. A. Largey, deceased. From an order granting plaintiff a new trial after judgment for defendant, defendant appeals. Reversed.

Mr. Bernard Noon, Messrs. McBride & McBride, and Messrs. Forbis & Evans, for Appellant.

Mr. Frank W. Haskins, Messrs. Roote & Clark, and Messrs. McHatton & Cotter, for Respondent.

MR CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought for the purpose of obtaining a decree in favor of plaintiff declaring the defendant, Patrick A. Largey, a trustee for plaintiff of a one-sixteenth interest in the Speculator quartz lode mining claim, situate in Silver Bow county, and requiring the defendant to execute to the plaintiff a deed for that interest, and to render an accounting for a one-sixteenth interest in the ores extracted from the property by the defendant. After the institution of the suit the defendant died, and Lulu F. Largey was substituted in his place, as his administratrix. The judgment in the court below was for defendant. Subsequently, on motion of the plaintiff, the court entered an order granting plaintiff a new trial. Thereupon defendant appealed.

The parties to the action have filed in this court a stipulation wherein it is set forth that they have settled their differences and controversies by a compromise of all matters involved; that they desire the order from which the appeal is taken reversed,

so that the judgment of the district court may stand as rendered; that *remittitur* be issued at once; and that this disposition of the appeal is desired because it is in accordance with the terms of the compromise and settlement made by the parties. This court is asked to make the order according to the terms of the stipulation. When the stipulation was filed, and counsel moved for the order, we entertained doubt as to whether this court could, with propriety, reverse the action of the district court upon an agreement of the parties, without an examination of the record, and a determination that the action of that court was in fact erroneous. Upon consideration, however, we deem it the duty of the court, so far as it may, when there is no question as to its jurisdiction in the particular case, to assist parties to settle their controversies by removing any obstruction which may stand in the way of such settlement. This cause involves title to valuable mining property, and, as the settlement between the parties contemplates the existence of a valid and subsisting judgment in favor of defendant, we think that the order desired may be made with propriety, though it is not apparent that the plaintiff would not, upon examination of the record, be found entitled to an affirmance of the order.

It is therefore adjudged that the action of the district court in the premises be reversed, and that the cause be remanded, with directions to that court to vacate the order granting a new trial, and that it permit the judgment in favor of defendant to stand as rendered.

Reversed and remanded.

MR. JUSTICE MILBURN: I dissent.

LARKIN ET AL., RESPONDENTS, v. BUTTE & BOSTON
CONSOLIDATED MINING CO. ET AL., APPELLANTS.

28	41
28	526
28	41
534	107

(No. 1,530.)

(Submitted April 15, 1903. Decided April 27, 1903.)

Appeal—Briefs—Rules of Supreme Court—Affirmance.

Where appellants' brief fails wholly to comply with Subdivision 3 of Rule X of the Supreme Court, the judgment appealed from will be affirmed.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

ACTION by Clara A. Larkin and another against the Butte & Boston Consolidated Mining Company and others. From an order appointing a receiver, defendants appeal. Affirmed.

Messrs. Forbis & Evans, for Appellant.

Mr. Charles R. Leonard, and *Messrs. Cullen, Day & Cullen*, for Respondents.

PER CURIAM.—The brief filed by the appellants in this action fails in every particular to comply with Subdivision 3 of Rule X of this court, and, upon the authority of *Casey v. Thieviege*, 27 Mont. 516, 70 Pac. 755, and cases cited, the order appealed from is affirmed.

Affirmed.

KNOBB, RESPONDENT, v. REED ET AL., APPELLANTS.

(No. 1,534.)

(Submitted April 10, 1903. Decided April 27, 1903.)

Appeal—Briefs—Rules of Supreme Court.

1. Under Supreme Court Rule X, Subdivisions 4 and 5, in the absence of consent by his adversary or an order of the court based upon a sufficient showing of some reason why the rule should be relaxed, counsel for respondent (when in default under the rule) may not file a brief or appear and argue orally the questions presented by the appeal, unless by express request of the court,—and a brief filed in violation of the rule will be stricken from the files.
2. Under Supreme Court Rule X, Section 3, an appellant's brief referring to the complaint, with citation of page and marginal number, but to no other matter which would aid the court in examining the points in controversy, is not a compliance with the rule, and necessitates an affirmance of the judgment.

Appeal from District Court, Lewis and Clarke County; S. H. McIntire, Judge.

ACTION by Eli Knobb against William Reed and others. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

Messrs. Stranahan & Stranahan, for Appellants.

Mr. R. R. Purcell, and *Mr. T. J. Walsh*, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

From the imperfect statement contained in appellants' brief this action appears to be one in conversion, by which the plaintiff seeks to recover from the defendants the value of certain mares and a stallion, together with one-half of their increase during the years from 1891 to 1898, inclusive. It appears that the animals were taken charge of by the defendants in 1891, at the request of one Seymour, their owner, under an agreement

that they were to be bred and cared for by the defendants, the latter being allowed to retain one-half of the increase as their compensation. Thereafter the plaintiff became the owner by purchase of the interest of Seymour. In August, 1898, the plaintiff demanded from the defendants a delivery of the property to himself under the terms of the arrangement made by Seymour. This the defendants refused, asserting title in themselves. Upon a trial, verdict and judgment were for plaintiff. These appeals are from the judgment and an order denying a new trial.

1. The transcript was filed in this court on March 19, 1900. Appellants' brief was filed on May 18, 1900. The respondent made no appearance, nor did he file his brief until March 21, 1903, a few days before the hearing. This was done without the consent of counsel for appellants. At the hearing counsel for respondent appeared, and, though objection was made, requested the court that he might be heard. The request was denied, there being no offer to show why the brief had not been filed in conformity with the rule.

Subdivision 4 of Rule X provides that counsel for respondent shall file with the clerk of this court seven copies of his brief, and serve a copy upon counsel for appellant within thirty days after appellant's brief shall have been served upon him. Subdivision 5 provides that, when respondent is in default under this rule, he shall not be heard except upon consent of his adversary or by request of the court. In the absence of consent by his adversary, or an order of the court based upon a showing by affidavit or otherwise of some reason why the rule should be relaxed, counsel may not file a brief, or appear and argue orally the questions presented by the appeal, unless by express request of the court. The rule was promulgated for the purpose of requiring counsel to prepare their cases for hearing in ample time before they are set for that purpose, and also to insure ample notice to opposing counsel of the points upon which it is intended to rely. The fact that the calendar of cases pending in this court is in arrears at the present time makes no difference

in the application of the rule, for, if obedience to it were not enforced, the result would be much confusion and misunderstanding between counsel and the court touching the orderly submission and determination of causes. This cause was set for hearing on April 10th by an order entered on March 7th. The brief was filed fourteen days after the order was made. Under like circumstances in many cases the appellant would be deprived of the opportunity to prepare and file a reply brief, or else the submission of the cause would be delayed in order to furnish such opportunity, the only reason therefor being that the respondent had neglected the plain requirements of the rule. For good reasons made to appear, the rule may be relaxed; but, when no such reason is made to appear, the penalty must be exacted. The brief of the respondent is therefore ordered stricken from the files.

2. But, notwithstanding respondent is in default and cannot have his brief considered, the merits of these appeals cannot be examined, because appellants' brief wholly fails to comply with the requirements of Subdivision a of Section 3 of Rule X. The statement or abstract required by the rule contains no references to the transcript in such a way that the pleadings, evidence, orders, and judgment may be readily found. It contains reference to the complaint, with citation of page and marginal number, but to no other matter which would aid the court in examining the points in controversy. Under the rulings heretofore made in many cases, the judgment and order must be affirmed. It is so ordered.

Affirmed.

PHILLIPS ET AL., APPELLANTS, v. COBURN ET AL.,
RESPONDENTS.

28	45
37	597

(No. 1,515.)

(Submitted April 6, 1903. Decided April 27, 1903.)

*Water Rights—Evidence—Appeal—Opinion of Trial Court—
Findings—Insufficiency of Evidence—Specifications of Par-
ticulars—Conflicting Evidence.*

1. On appeal the opinion of the lower court has no place in the record and cannot be looked to for any purpose, and a contention that it shows that the court did not consider certain evidence which was admitted without objection cannot be entertained.
2. In an action to enjoin defendants from diverting certain waters claimed by plaintiffs for irrigation purposes, the parties stipulated that no question should be made as to the titles of the respective parties to the lands described in the pleadings, and in connection with which the water claimed by each was to be used. *Held*, that evidence that defendants' premises were located upon an Indian reservation, which they could not lawfully occupy, was inadmissible.
3. In an action involving the priority of appropriations of certain water rights plaintiffs contended that the appropriation made by their predecessor in interest was made in July of a certain year, and the court found that the appropriation was made in October of that year. *Held* that, notwithstanding this finding, evidence of declarations made by plaintiffs' predecessor in interest, tending to show that in August of the year in question they had made no appropriation, was admissible under Code of Civil Procedure, Section 3125.
4. Where the specifications of particulars wherein the evidence is alleged to be insufficient to support the findings do not meet the requirements of Section 1173, Code of Civil Procedure, they will be disregarded.
5. Where the evidence is conflicting, findings of fact of the district court are conclusive on appeal.

*Appeal from District Court, Choteau County; Dudley Du
Bose, Judge.*

ACTION by Benjamin D. Phillips and others against Robert J. Coburn and another. From a judgment for defendants, and from an order denying a motion for a new trial, plaintiffs appeal. Affirmed.

STATEMENT OF THE CASE.

Action by plaintiffs for a perpetual injunction to restrain the

defendants from diverting the waters of Big Beaver or Warm Springs creek, in Choteau county. The plaintiffs allege a prior right to the free and unobstructed use of 2,000 inches of said waters for agricultural purposes upon lands owned by them, and particularly described in the complaint. This claim is based upon two appropriations—one of 1,000 inches, alleged to have been made by plaintiffs Sieben and Ester on August 2, 1889; and the other made by John T. Mercer and Henry Marshall, the predecessors of plaintiffs, on July 8, 1889—both of which rights are now held in common by all the plaintiffs. It is alleged that defendants were engaged at the commencement of the action in diverting the waters so that they did not reach the heads of the plaintiffs' ditches, and threatened to continue to so divert them, so that plaintiffs were and would be prevented from using them to irrigate their growing crops of grain and grasses, thus suffering irreparable injury. The defendants deny all the material allegations contained in the complaint, and then, by way of counterclaim, set up a right in themselves to the free and unobstructed use of the waters to the extent of 700 inches under an appropriation of them made by themselves on July 30, 1889, followed immediately by diversion and continued use of them thereafter for agricultural purposes upon lands owned and occupied by the defendants. Their answer concludes with a prayer that they be decreed to have a prior right to the extent of 700 inches, and for general relief. There was issue upon the counterclaim by replication.

At the beginning of the trial the parties entered into the following stipulation: "It is agreed in this case that no question is made or will be urged as to the titles of the respective parties plaintiff and defendant to the lands described and mentioned in the pleadings herein, and the various denials in that regard are hereby withdrawn, it being the intention of the parties hereto to have determined only the respective rights of the parties hereto to the water and water right asserted by them, respectively, and to the quantity of water which their respective ditches were capable of carrying when first used. The conveyances of

the titles of the respective parties to the waters in question from their predecessors in interest are not denied, and the denials in that regard are also withdrawn."

Upon the evidence submitted the district court found that the defendants actually diverted the waters to the extent claimed by them on August 11, 1889, and thereafter continuously used them for agricultural purposes; that Sieben and Ester diverted them to the extent of 500 inches on September 25, 1889; that the Mercer and Marshall diversion to the extent of 300 inches was completed on October 1, 1889; and that, as a matter of law, the parties were entitled to the use of them in the order indicated by these dates, and to the extent of their respective appropriations. A judgment was entered accordingly. From the judgment and order denying them a new trial, plaintiffs have appealed.

Messrs. Toole & Bach, for Appellants.

Cited: Revised Statutes, U. S., Sections 2339, 2340; *Buttz v. N. P. Ry.*, 119 U. S. 55; *Barden v. N. P. Ry. Co.*, 145 U. S. 535; *McFadden v. M. V. M. Co.*, 97 Fed. 670.

Mr. H. G. McIntire, and *Mr. Fletcher Maddox*, for Respondents.

Respondents' title is at least good against every person except the government. (*First Nat'l Bank v. Roberts*, 9 Mont. 373; *Natoma W. & M. Co. v. Clarkin*, 14 Cal. 544; *California S. T. Co. v. Alta T. Co.*, 22 Cal. 430; *Union W. Co. v. Murphy F. F. Co.*, 22 Cal. 630.)

The issue as to whether respondents' ditch was upon the Indian reservation was an immaterial one; when the appropriation was made it was upon the public domain, and there can be no doubt of the right to appropriate water flowing through the public domain. (*Lehi Irr. Co. v. Mayle* (Utah), 9 Pac. 875; *Kaylor v. Campbell* (Oregon), 11 Pac. 301; *Smith v. Denniff* (Mont.), 60 Pac. 398.)

Findings are only necessary upon material issues. (*Knowles v. Leale*, 64 Cal. 377; *Louvall v. Gudley*, 70 Cal. 507; *Malone v. County of Del Norte*, 77 Cal. 217.)

Even if this was a material issue, the failure of the court to find thereon is not reversible error, inasmuch as appellants presented no request for such findings. (Code of Civil Procedure, Sec. 1114; *Haggin v. Saile*, 23 Mont. 375; *Gallagher v. Cornelius*, 23 Mont. 27; *Currie v. Mont. Cent. Ry. Co.*, 60 Pac. 989; *Noland v. Bull* (Oregon), 33 Pac. 983; *Dutertre v. Shallenberger* (Nev.), 34 Pac. 449; *Bank of California v. Dyer* (Cal.), 44 Pac. 534; *Larimer & W. I. Co. v. Wyatt* (Colo.), 48 Pac. 528.)

MR. CHIEF JUSTICE BRANTLY, after stating the case, delivered the opinion of the court.

1. Contention is made by counsel for appellants that the district court erred in excluding certain evidence tending to show that the defendants' ditch and premises are upon the Fort Belknap Indian reservation. This contention proceeds upon the theory that, if it were made to appear that defendants' ditch and lands are within the limits of the reservation, this fact would necessitate a finding that defendants are not entitled to the use of any of the waters in controversy, because they could not lawfully occupy any portion of the reservation, or make an appropriation of waters thereon. The record discloses that the evidence was offered by the plaintiffs, and admitted without objection. Presumably, it was considered by the court so far as it was pertinent to any question involved in the case. Counsel say, however, that the memorandum opinion of the court filed with the clerk and incorporated in the record shows that the court expressly excluded this evidence in making up the findings, and refer to the memorandum as the basis upon which to predicate this assignment of error. The opinion of the court has no place in the record, and cannot be looked to for any purpose. (*Cornish et al. v. Floyd-Jones*, 26 Mont. 153,

66 Pac. 838; *Menard v. Montana Central Ry. Co.*, 22 Mont. 340, 56 Pac. 592; *Butte & Boston Mining Co. v. Societe Anonyme des Mines de Lexington*, 23 Mont. 177, 58 Pac. 111, 75 Am. St. Rep. 505.) It is, therefore, not apparent from the record, to which alone this court may look, that the plaintiffs were prejudiced by the trial court in refusing to give such weight to the evidence in question as it deserved. We do not wish, however, to be understood by anything here said as holding that the evidence was competent, and should have been considered. Under the stipulation above referred to, an inquiry into the title by which the defendants hold their lands was not pertinent to the case. Whether the right of defendants to the use of the water through a ditch which was taken out upon the reservation could thus be attacked in a collateral way, or whether this was a question exclusively between defendants and the federal government, we do not undertake to decide, because it is not properly before us.

2. It is argued that the court erred to the prejudice of the plaintiffs in admitting evidence of declarations by Marshall and Mercer, the predecessors of plaintiffs, in disparagement of their right to the use of any of the waters of Warm Springs creek under the appropriation alleged to have been made by them on July 8, 1889, and prior to their conveyance to plaintiffs. The evidence tended to show that early in August, 1889, they had some conversation with certain of the witnesses who testified at the hearing, and at that time stated that they desired "to take up" a water right, and asked for information as to how they should proceed. The argument is that, inasmuch as the court found that their appropriation was made on October 1, 1889, their declarations made in August could not be regarded as in disparagement of their title, because they could not then have been in possession of the property about which they were speaking. There is no merit in this contention. The plaintiffs claimed through Marshall and Mercer under an alleged appropriation by them in July, and continuous possession and use by them until they conveyed to plaintiffs. They

offered evidence tending to support this claim. This being so, plaintiffs could not effectively resist the introduction of their declarations made subsequent to that date, which tended to show that their claim was unfounded. The evidence falls clearly within the rule declared by Section 3125 of the Code of Civil Procedure, and was admissible. Its admissibility and probative character was not affected by the finding of the court that the appropriation was in fact made at a later date than that claimed. Presumably, these very declarations in a measure influenced the court in finding as it did. According to the plaintiffs' contention, they should have been held admissible only after conclusive proof that the appropriation had been made by Mercer and Marshall as alleged.

3. The point is made that the evidence is insufficient to support the findings. The specifications of particulars wherein the evidence is alleged to be insufficient do not meet the requirements of the statute (Section 1173, Code of Civil Procedure), but are subject to the same infirmity as those criticised in *Cain v. Gold Mountain Mining Co.*, 27 Mont. 529, 71 Pac. 1004, and cases cited. We find, however, from such examination as we have been able to make of the evidence, unassisted by suitable specifications, that it is conflicting upon all the issues involved. We must, therefore, accept the judgment of the district court thereon as conclusive.

The judgment and order are affirmed.

TAGUE, RESPONDENT, v. JOHN CAPLICE COMPANY,
APPELLANT.

(No. 1,501.)

(Submitted March 20, 1903. Decided April 27, 1903.)

Corporations—Borrowing Money—Officers — Powers—Action—Continuance—Absence of Witness—Admissions—Effect—Evidence—Pleadings in Other Suits—Issues—Withdrawal—Appeal—Misconduct of Court—Preservation—Affidavits—Review.

1. Where, in an action for money loaned, defendant claimed that plaintiff and C. were partners, and that the money was loaned by plaintiff to be used in their business, and thereafter the notes of a third person who conducted the business for the firm were received by plaintiff in settlement of the advancement, a verified complaint in an action by defendant against the wife of such manager, in which defendant claimed to be the owner of such business, was admissible.
2. Where defendant's articles of incorporation provided that it was organized to buy and sell wood, etc., and the minutes of a stockholders' meeting showed a motion, duly passed, ratifying certain contracts modifying a prior contract with N. employing him to manage the business, such contracts were not objectionable on the ground that their execution by the officers of the company were acts *ultra vires*.
3. In the absence of any proof to the contrary, the executive officers of a corporation executing a contract under the corporate seal, in the name and on the behalf of the corporation with reference to business comprehended in the articles of incorporation, and in which it is shown that the corporation is actually engaged at the time, will be presumed to have full authority to bind the corporation by such act, and by the declarations and admissions contained in the contract itself, hence such contract is not objectionable for failure to prove the authority of the officers to execute the same.
4. The admission of evidence in chief for the purpose of disproving an affirmative defense contained in defendant's answer, which would have been proper in rebuttal, was not error.
5. Under Code of Civil Procedure, Section 1172, providing that when an application for a new trial is made for irregularity in the proceedings of the court, or for an abuse of discretion, it must be made on affidavits, an alleged error, consisting in the use of certain language by the court in the presence of the jury during the trial, cannot be reviewed, where the error is not preserved and brought into the record by affidavit.
6. The exclusion of evidence cannot be reviewed where no offer to prove the facts sought to be elicited by the excluded interrogatory was made.
7. The exclusion of impeaching evidence was not error where the offer of proof did not fix the time when the alleged conversation occurred, or designate the persons present, and no foundation was laid therefor in the examination of the witness sought to be impeached, as required by Code of Civil Procedure, Section 3380.

28	51
28	569
28	51
30	888
28	51
35	309
36	103

28	51
37	22
38	40
28	51
41	433
28	51
40	35
40	497

8. Under Code of Civil Procedure, Section 1039, the fact that plaintiff admitted that defendant's absent witnesses would testify as alleged, if present, did not deprive plaintiff of the right to object to the competency, relevancy, and materiality of such facts.
9. Where evidence excluded by the trial court is not in the record, the alleged error of the court in excluding it cannot be reviewed.
10. Where, in an action for money loaned, there was no evidence that plaintiff had any knowledge that defendant intended to loan the money to N., or that plaintiff had agreed to accept N.'s notes in payment of the loan to defendant, the notes executed by N., some of which were made payable to defendant, and some to plaintiff by direction of defendant's trustees, without authority from plaintiff, were inadmissible.
11. Where there was no evidence whatever on an issue raised by the pleadings, it was proper to withdraw such issue from the jury.

Appeal from District Court, Silver Bow County; John Lindsay, Judge.

ACTION by Thomas Tague against the John Caplice Company, a corporation. From a judgment in favor of plaintiff, and from an order denying its motion for a new trial, defendant appeals. Affirmed.

STATEMENT OF THE CASE.

This action was commenced in the district court by the plaintiff, Tague, against the John Caplice Company, a corporation, to recover a balance of \$10,842.32, alleged to be due the plaintiff for moneys loaned by him to the defendant company. The answer denies the material allegations of the complaint, and sets up these affirmative defenses: First. That the plaintiff, Tague, and John Caplice had been engaged in the wood business at Bernice, Jefferson county, Montana, and that all moneys mentioned in plaintiff's complaint were by the plaintiff, Tague, delivered "to this defendant, to be by this defendant used for the benefit of said plaintiff and of the said John Caplice in carrying on the said wood business and in paying the expenses thereof." Second. That Tague and Caplice entered into negotiations with one Hiram Nelson to conduct the wood business for them, and that Nelson, to secure the necessary means to carry on such business, borrowed this money and executed his promissory notes therefor; that such notes were transmitted

to this defendant company, by it delivered to the plaintiff, and by the plaintiff accepted and received as payment and settlement in full for all moneys so advanced by him. When the cause came on for trial, the defendant company made a motion for continuance upon the ground of the absence of two witnesses, J. Ross Clark and J. K. Heslet. The application was made upon an affidavit setting forth the facts to which these witnesses would testify if present in court. Thereupon the plaintiff admitted that, if the witnesses were present, the evidence would be offered as set forth in affidavit, but to certain portions of such evidence the plaintiff reserved the right to object when it was offered. Thereupon the court overruled the motion for continuance, and the cause proceeded to trial. The court, after defining the issues raised by the pleadings, instructed the jury that no evidence had been offered to establish the fact that any association had ever existed between the plaintiff and John Caplice in the wood business, or that any of the moneys loaned by the plaintiff had ever been paid by the notes of Hiram Nelson, or otherwise, and directed the jury to disregard those defenses set forth in the defendant's answer, and that the only question before them for determination was whether the money was loaned to the defendant, John Caplice Company, and that the burden of proof was upon the plaintiff to establish this fact. The jury returned a verdict in favor of the plaintiff for the full amount claimed, and from the judgment entered thereon, and from an order denying its motion for a new trial, the defendant has appealed.

Mr. Jesse B. Roote, and Mr. W. A. Clark, Jr., for Appellant.

Whether a note is taken in payment of a debt is a question for the jury. (*Crabtree v. Rowand*, 33 Ill. App. 423; *Goldshede v. Cottrell*, 2 Mees. and W. 20; *Lyman v. Bank of U. S.*, 12 How. (U. S.), 225; *Myatts v. Bell*, 41 Ala. 222; *Casey v. Weaver*, 141 Mass. 280; *Corner v. Pratt*, 138 Mass. 446; *Coburn v. Odell*, 30 N. H. 540, 557; *Johnson v. Cleaves*, 15 N. H. 332;

White v. Jones, 38 Ill. 159; *Bonnell v. Chamberlain*, 26 Conn. 487; *Susquehanna Fertilizer Co. v. White*, 66 Md. 444, 59 Am. Rep. 186; *Solomon v. Pioneer Co-Operative Co.*, 20 Fla. 374, 58 Am. Rep. 667; *Bullen v. McGilcuddy*, 2 Dana (Ky.), 91; *Gardner v. Gorham*, 1 Dougl. (Mich.), 207; *Kerl v. Bridgers*, 10 Smed. & M. (Miss.), 612; *Seltzer v. Coleman*, 32 Pa. St. 493; *Horner v. Hower*, 49 Pa. St. 475; *Brown v. Scott*, 51 Pa. St. 357; *Union Bank v. Smizer*, 1 Sneed (Tenn.), 501; *Johnson v. Weed*, 9 John. (N. Y.), 310; same case reported in 6 Am. Decisions, 279.)

If a note of a third person is taken for a debt, such note will be deemed to have been accepted by the payee in payment, unless the contrary be expressly proved. (*Whitbeck v. Van Hess*, 11 John. (N. Y.), 409; also 6 Am. Dec. 383; *Melledge v. Boston Iron Co.*, 5 Cush. (Mass.), 158, 51 Am. Dec. 59; 2 Benjamin on Sales, 6th Ed., 938; 18 Am. & Eng. Ency. of Law, 169.)

If the question of whether a note was accepted in payment is a question for the jury, then evidence of any fact tending to prove that question is competent to go before the jury in determining the ultimate fact. It is not necessary to prove an express agreement to the effect that the note was taken in settlement; this fact may be proven by facts and circumstances surrounding each case; said question is one of fact for the jury. (*White v. Jones*, 38 Ill. 159; *Holchin v. Secor*, 8 Mich. 494.)

Where there is evidence tending to prove a fact having an important bearing upon the law of the case, though strongly contradicted, an instruction is erroneous which ignores the existence of such a fact, and takes it from the consideration of the jury. (*Chicago P. & P. Co. v. Tilton*, 87 Ill. 547.)

When the evidence tends to prove a certain state of facts, the party in whose favor it is given has a right to have the jury instructed on the hypothesis of such a state of facts, and leave it to the jury to find whether the evidence is sufficient to establish the facts supposed in the instruction. If the instructions are pertinent to any part of the testimony, they should, if cor-

rect, be given without regard to the amount of evidence to which they apply. (*Griel v. Marks*, 51 Ala. 566; *State v. Gibbons*, 10 Ia. 117; *Kendall v. Brown*, 74 Ill. 232.)

When an instruction is asked upon a question concerning which there is no direct testimony, yet if there be any proof tending to establish it, such question should be submitted to the jury, as the party asking instruction is entitled to the benefit of whatever inference the jury may think proper to draw from the proof, however slight. (*Peoria Ins. Co. v. Anapow*, 45 Ill. 87; *Flournoy v. Andrews*, 5 Mo. 513; *Camp v. Phillips*, 42 Ga. 289.)

The instructions of the court should be restricted to the issues made by the pleadings, and to the evidence. (*Nollen v. Wisner et al.*, 11 Ia. 190; *Iron Mount. Bank v. Murdock*, 62 Mo. 70.)

If there was any evidence in this case—and there certainly was an ample amount of it—which tended in the remotest degree to prove that Tague accepted the notes in question as payment, then he could not recover in this case if the jury would so find, and the court should have instructed the jury upon all the facts pertinent to the issues of which there was any evidence to support them. (*Eli v. Tallman*, 14 Wis. 28; *Hill v. Canfield*, 56 Pa. St. 454; *Howe S. Mach. Co. v. O. Laymen*, 88 Ill. 39; *Atkins v. Nicholson*, 31 Mo. 488; *Toledo, etc. Ry. Co. v. Shuckman*, 50 Ind. 42; *Wabash Rd. Co. v. Henks*, 91 Ill. 406.)

The charge of the court should be strictly confined to matters of law, and it is erroneous for the judge to tell the jury what facts are proved and what are not. The court has no authority to instruct the jury as to what the evidence proved. (*Russ v. Steamboat, etc.*, 9 Ia. 374; *Thompson v. Hovey*, 43 Ill. 198; see note to Section 1080, pp. 259 to 262 of the Code of Civil Procedure of Montana, 1895.)

It is error for the court to take from the consideration of the jury any evidence that tends to prove a fact, though strongly contradicted, that has an important bearing on the case. (*Chicago P. & P. Co. v. Tilton*, 87 Ill. 547.)

The province of the court is to instruct the jury as to the law of the case and that of the jury to find the facts proven by the evidence. It is error for the court in giving an instruction to assume that facts have been proved or not proved or that a certain state of facts exists. (*Russell v. Minter*, 83 Ill. 150; *Stier v. The City, etc.*, 41 Ia. 353; *Siebert v. Leonard*, 21 Minn. 442.)

It is error to tell the jury, without qualification, that the evidence raises a presumption of a particular fact, or is sufficient to justify finding a particular fact, if it raises not a presumption of law, but only a presumption of fact on which they might find either way. (*Stone v. Geyser Q. M. Co.*, 52 Cal. 315; *Allison v. State*, 42 Ind. 354, 357; *Read v. Hurd*, 7 Wend. 408.)

If the court instructs the jury that the matters given in evidence are conclusive on the one side, and the matters given in evidence on the other side are not sufficient, and that if the jury agree with him in opinion they ought to find so and so, without more, it is error. (*Firemen's Ins. Co. v. Walden*, 12 John. 513, 7 Am. Dec. 340; *Gordon v. Little*, 8 Serg. & R. 533, 11 Am. Dec. 632; *Allis v. Leonard*, 58 N. Y. 288; *Massoth v. Delaware & H. C. Co.*, 64 N. Y. 524, 533.)

It is a settled rule of law as old almost as the law itself, that in trials by a jury, the judge decides questions of law and the jury questions of fact. (Coke on Littleton, 155-156; Foster's Cr. Law, 256.)

The jury, in action at law, are judges of the facts, and the judge has no power or right to give binding instructions, where no conclusive fact is proven; and even if he thinks the testimony to establish a material fact was incredible he cannot instruct the jury to cast it aside. (*Curry v. Curry*, 114 Pa. St. 367.)

The court has no right to direct as to the weight the jury shall give to any evidence submitted to them. (*State v. Hoffman*, (Oregon), 16 Pac. Rep. 640.)

"Where the evidence conflicts without any apparent prepon-

derance on either side, it was error to instruct the jury to find for the defendant." (*Adams v. Berg* (Miss.), 3 So. Rep. 465.) In other words, the court must not invade the province of the jury. (Note 2, page 238 of Vol. 11, 1st Ed. Am. & Eng. Ency. of Law.)

It is the duty of the court to instruct upon whatever state of facts there is evidence tending to prove and the instructions should be confined to the issues. (Proffat in *Jury Trial*, Sec. 313; *Nollen v. Wisner*, 11 Iowa, 190; *King v. King*, 37 Ga. 205; *Miles v. Douglas*, 34 Conn. 393; *Hill v. Canfield*, 56 Pa. St. 454; *Hooker v. Johnson*, 6 Fla. 630.)

The judge in this case was not bound to sum up the evidence, much less strike any of it out, but as he did so he should have presented all the material facts under the issues and not have instructed the jury upon any isolated facts, and should not give undue prominence to certain portions of the evidence; and if he assumes to state the evidence to the jury it is his duty to state all the evidence to them fairly and candidly without striking out any or giving undue prominence to any part of it. (*Thompson, Charging the Jury*, 109, 111; *State v. Norris*, 3 Hawks (N. C.), 390; *Penn. R. Co. v. Zebe*, 33 Pa. St. 318.)

The judge should not frame his instructions as to assume a disputed state of facts as proven. This rule is of equal application in both civil and criminal cases. (*Seibert v. Leonard*, 21 Minn. 442; *Straus v. Minzesheimer*, 78 Ill. 492; *Boddie v. State*, 52 Ala. 395; *Wash., etc. R. Co. v. Gladmon*, 15 Wall. (U. S.), 401; *N. Y. Life Ins. Co. v. Baker*, 94 U. S. 611; *Peck v. Ritchey*, 66 Mo. 114; *Gaither v. Martin*, 3 Md. 162; *State v. Kennedy*, 7 Nev. 374; *Kinney v. Williams*, 1 Colo. 191; *Wall v. Goodenough*, 16 Ill. 415; *Walters v. Chicago, etc. R. Co.*, 41 Iowa, 71; *McDonald v. Beal*, 55 Ga., 288; Chapter of Instructions in Vol. 11, page 236 of the 1st Ed. of the Am. & Eng. Ency. of Law, and Chapter 18 of Hayne on New Trial and Appeal, Sec. 120, page 329.)

The court erred in sustaining the objections made by counsel for plaintiff to the evidence offered on the part of defendant.

(Rice on Evidence, Vol. I, Chap. XI, p. 431; *Platner v. Platner*, 78 N. Y. 90; *Trull v. True*, 33 Me. 367; 3 Wait, L. & Pr., 272; *Hart v. Newland*, 3 Hawks. 122; *Home Ins. Co. v. Weide*, (78 U. S.) 11 Wall. 438; *Hagerty v. Andrews*, 94 N. Y. 195; Rice on Evidence, Vol. I, Chap. XII, p. 488.)

Mr. W. W. Dixon, and *Messrs. McHatton & Cotter*, for Respondent.

MR. JUSTICE HOLLOWAY, after stating the case, delivered the opinion of the court.

Upon the trial the plaintiff offered in evidence a complaint in an action commenced by the defendant herein, the John Caplice Company, against Fannie Nelson, in the district court of Silver Bow county, on May 18, 1896, in which complaint the John Caplice Company claimed to be the owner of the wood business at Bernice, Jefferson county, Montana, which complaint contains copies of two contracts purporting to have been executed between the John Caplice Company and Hiram Nelson with reference to the wood business at Bernice. The complaint further claimed that the defendant, Fannie Nelson, was attempting to assert ownership to the wood and to dispose of it, and asked that by a decree of the district court the John Caplice Company be declared to be the owner and entitled to the possession of such wood. This complaint was verified by the secretary of the company. This evidence was objected to as immaterial and incompetent, and upon the ground that the contracts set out in the complaint show that their execution by the officers of this defendant company were acts *ultra vires*. The objection was overruled, and error is now assigned.

We think the evidence was properly admitted. It is a well-settled rule that declarations or admissions of a party made in pleadings are admissible against him in another action in behalf of a stranger to the action in which such pleadings were filed, if they were verified by the party or prepared under his instructions. (*Pope v. Allis*, 115 U. S. 363, 6 Sup Ct. 69, 29

L. Ed. 393; *Hyman v. Wheeler* (C. C.), 29 Fed. '347; *St. Louis Mutual Life Ins. Co. v. Cravens*, 69 Mo. 72; *Elliott v. Hayden*, 104 Mass. 180.) The contracts referred to in the complaint were made with reference to the wood business at Bernice, one dated December 10, 1894, and the other dated April 6, 1895, which referred to the same subject-matter, and purported to modify somewhat the terms of the prior contract. The order of proof may have been somewhat irregular, but in view of the fact that plaintiff immediately offered in evidence the articles of incorporation of the John Caplice Company, which, among other things, provided that the objects for which the corporation was organized were "to buy and sell wood and lumber and building material of whatever kind, to establish, conduct and carry on the business of cutting, buying and selling and manufacturing cord wood," etc., and further offered in evidence the minutes of the meeting of the stockholders of such corporation showing the election of officers, and which minutes contain this recital: "It was moved by John Branagan that the contract dated the 10th day of December, 1894, made between the John Caplice Company, a corporation, party of the first part, and Hiram Nelson, party of the second part, be approved and ratified. The motion was seconded by Arthur H. Wethey, and was carried unanimously"—which minutes were signed and attested by the president and secretary of the corporation—we cannot say that the district court erred in its ruling.

The plaintiff also offered in evidence a contract between the John Caplice Company and Hiram and Fannie Nelson, dated July 8, 1896, which provided for the compromising of certain lawsuits, and which contract further contained the provision that the John Caplice Company was at that date the owner of the wood business at Bernice, and further provided for the disposition of the wood. This contract recited that the John Caplice Company made the contract, and caused it to be executed by its president and secretary, by whom it was signed, and to which the corporate seal was attached. To this offer the defendant company objected on the ground "that it does not appear

that the party executing this contract as president of the John Caplice Company had any authority to do so." This objection was overruled and exception taken, and it is now urged that the district court erred in permitting this evidence to go to the jury. We think there is no merit in the contention. The record of the proceedings of the organization of the corporation, the election of its officers, the adoption of its corporate seal, a copy of its articles of incorporation, and evidence that the company was actually engaged in the wood business at Bernice, had all been introduced, and the contract was signed by the executive officers designated by the trustees of that company and attested by the corporate seal, and, in the absence of any proof to the contrary, the executive officers of a corporation executing contracts in the name and on behalf of the corporation with reference to business comprehended in the articles of incorporation, and in which it is shown that the corporation was actually engaged at the time of the execution of such contracts, will be presumed to have full authority to bind the corporation by such acts, and by the declarations and admissions contained in the contracts themselves. (4 Thompson on Corporations, Sec. 5106.)

Objection was made to all of this documentary evidence on the ground that it was immaterial, and, so far as this objection is concerned, we may say that we are of the opinion that the plaintiff assumed a burden which it was not necessary for him to do. At the beginning of the proceedings the defendant had asserted in an affirmative defense that the wood business at Bernice was carried on by the plaintiff herein and one John Caplice, and it was not necessary for the plaintiff to offer evidence to dispute that, or to show that as a matter of fact such wood business was actually carried on by the John Caplice Company, until after the defendant company had offered some evidence in support of such affirmative defense; in other words, this evidence was properly rebuttal, but it was directed to an issue fairly raised by the pleadings, and no possible harm could have been suffered by the defendant by reason of the fact that the plaintiff was assuming the burden, in the first instance, of dis-

proving an affirmative defense contained in the defendant's answer by evidence which would have been perfectly proper in rebuttal. If there was error at all, it was in the order of proof, and entirely without prejudice.

During the progress of the trial, in a colloquy between the court and counsel, the court made use of certain language in the presence of the jury, to which the defendant took exception, and it is now urged that this was prejudicial error. If error, it was because of an irregularity in the proceedings of the court, or an abuse of its discretion, as specified in Section 1171 of the Code of Civil Procedure, and such error can only be saved and brought into the record on appeal to this court by affidavit. (Section 1172, Code of Civil Procedure; *Coleman v. Perry*, 28 Mont. 1, 72 Pac. 42.) This was not done, and the alleged error is not, therefore, before us.

Upon the examination of the witness Corbett for the defendant, this question was asked: "Did you ever have any conversation with Mr. Caplice, or hear Mr. Caplice have any conversation, regarding this wood business that is in litigation in this case, at any time?" An objection to the question was sustained, and error is now predicated upon such ruling. No offer to prove the facts sought to be elicited by the question was made, the excluded evidence is not before us, neither is it apparent from the question itself, and it is therefore impossible for this court to say whether there was error in the ruling of the trial court.

An offer was made by defendant to prove the substance of a conversation had between Mr. Heslet, the then president of the defendant company, and the plaintiff to this action, and, had the proper foundation been laid, the evidence would have been admissible and material, as tending to contradict the plaintiff's theory of the case, and possibly discredit the plaintiff himself; but it was clearly impeaching evidence, and the offer did not fix the time when the alleged conversation occurred or designate the persons who were present at the time, neither was the statement contained in the offer related to the plaintiff when he was

on the witness stand, and the proffered testimony was therefore properly excluded. (Section 3380, Code of Civil Procedure; *State v. O'Brien*, 18 Mont. 1, 43 Pac. 1091, 44 Pac. 399.)

When the defendant came to offer its proof, and attempted to introduce in evidence the affidavit containing the testimony to which it was admitted the absent witnesses J. Ross Clark and J. K. Heslet would testify, objections were made to certain portions of that testimony, and by the court sustained. The defendant now claims that this was error, and that it was misled by the ruling of the court in first denying its motion for continuance upon the ground that the plaintiff had admitted that the witnesses, if present, would testify to those facts, and then excluding certain of the facts. Upon this we may say that an admission, upon the part of one party, that witnesses for the other, if present, would offer to testify to certain facts, does not admit the competency, relevancy, or materiality of the evidence, or preclude the party making the admission from objecting to any portions of the testimony to be offered upon any of those grounds. This is clearly the meaning of Section 1039 of the Code of Civil Procedure. If the absent witnesses had been present, the plaintiff would have had the undoubted right to make such objection, and the court to sustain it, so that the defendant was in no worse position than he would have been had his witnesses been in court. However, the evidence excluded is not embraced in the statement on motion for new trial, and not before this court at all. It is therefore impossible for us to say whether or not the testimony sought to be adduced, but excluded, should have been admitted.

The defendant offered in evidence the eight notes which had been taken from Hiram Nelson, four of which were made payable to the John Caplice Company and four made payable to the plaintiff, Tague, by direction of J. Ross Clark, a trustee of the defendant company. Upon objection they were excluded. There is absolutely no evidence in the record tending to show that the plaintiff, Tague, had any knowledge whatever of what use was being made of his money after it was delivered to the

defendant. There is no evidence in the record whatever that he had ever authorized the defendant to loan his money to and take therefor the notes of third parties, or that he had ever agreed to accept such notes in payment for the money loaned by him; and neither at the time these notes were offered in evidence, nor at any other time during the course of the trial, was any attempt made to show that the plaintiff had ever agreed to take these notes, or any of them, further than the mere fact that when plaintiff had directed John Caplice, who had possession of certain papers belonging to Tague, to turn over to his attorney, W. W. Dixon, all of his (Tague's) papers, Caplice had, among others, delivered to Mr. Dixon these notes, and they had been retained by him until the time of the trial.

Complaint is made that the court invaded the province of the jury in instructing them that no evidence had been offered proving, or tending to prove, the existence of any copartnership or association between the plaintiff, Tague, and John Caplice in the wood business at Bernice, or that proved, or tended to prove, that the plaintiff had ever accepted the Nelson notes in satisfaction for the money which he had delivered to this defendant. While it is true that the jury are the sole judges of the facts in the case, and to them should be submitted for their determination every issue of fact upon which there is any substantial evidence, it is the duty of the court, when no testimony whatever has been offered upon an issue raised by the pleadings, to withdraw it from the jury, and not permit them, by mere surmises, conjectures, or speculations, to determine such an issue by their verdict. (*Campbell v. Metcalf*, 1 Mont. 378; *Sweeney v. Darcy*, 21 Mont. 188, 53 Pac. 540.)

The only question before the court and jury for determination upon the pleadings and the evidence in this case was whether or not the plaintiff's money had actually been loaned to the defendant company, and that issue was fairly submitted, upon proper instructions, to the jury, and determined in the plaintiff's favor.

We have carefully examined the other errors assigned by the

defendant, but find no merit in them. The evidence is amply sufficient to support the judgment, and, no error appearing in the record, the judgment and order appealed from are affirmed.

Affirmed.

28	64
38	133

BIRNEY, APPELLANT, v. WARREN, RESPONDENT.

(No. 1,502.)

(Submitted March 21, 1903. Decided April 27, 1903.)

*Taxation — Personal Property — Assessment — Misnomer—
Effect on Sale—Caveat Emptor—Statement of Facts—Con-
clusion of Law—Contradiction—Effect.*

1. Political Code, Sections 3700, 3707, which provide that personal property must be assessed to the person by whom it is owned or claimed, and that if the name of an absent owner is unknown it must be assessed to "unknown owners," are mandatory, and a misnomer of the owner of personal property assessed as the property of a particular person vitiates the assessment and renders a sale thereunder void; Section 3916, which provides that, when land is sold for taxes correctly imposed as the property of a particular person, no misnomer of the owner, or supposed owner, shall affect the sale, not applying to personal property.
2. The rule of *caveat emptor* applies to sales of property for delinquent taxes.
3. Under Code of Civil Procedure, Section 1117, which provides that an agreed statement of facts has the effect of special findings, a conclusion of law contradictory of the agreed statement is sufficient to vitiate the judgment.

Appeal from District Court, Broadwater County; F. K. Armstrong, Judge.

INJUNCTION by Charles A. Birney against John J. Warren. From a judgment for defendant, plaintiff appeals. Reversed.

STATEMENT OF THE CASE.

The action was commenced by the plaintiff, Birney, to secure an injunction restraining the defendant, Warren, from removing certain hoisting and other mining machinery and

certain frame buildings from unpatented mining claims situate in Jefferson (now Broadwater) county, Montana. The plaintiff in his complaint claims that he was at the date of the commencement of the action, April 26, 1897, the owner, in possession and entitled to the possession, of the above-mentioned property, and that the defendant threatens to and will, unless restrained by the court, remove the same and carry it away. The defendant answered, setting up his claim to the property by virtue of a bill of sale which he had received from the county treasurer upon a pretended sale of the property for delinquent taxes for the year 1896. The parties then agreed upon a statement of the facts, upon which the cause was tried, it being conceded and certified in the bill of exceptions that the agreed statement contains all the facts. The facts agreed upon, so far as they are material to a decision of this case, are: That the county assessor assessed the property above mentioned for the year 1896 as personal property, having a value of \$1,500 independent of the mining claims upon which it was located and to which it was appurtenant; that he assessed it in the name of the Queen Bee Mining Company; that no objection was made to the board of equalization of the assessment of the property; that the tax levied upon the property was not paid; that the treasurer sold the same in the manner provided by law for the sale of personal property for delinquent taxes; that the defendant, Warren, became the purchaser at such sale, and received a bill of sale from the treasurer for the property; that, as a matter of fact, no such corporation or concern as the Queen Bee Mining Company was in existence until after the date of the sale of the property; that the plaintiff, Birney, and one McPherson purchased the property in January, 1896; and that they were both nonresidents unknown to the assessor. The agreed statement then contains this paragraph: "That on the 13th day of July, 1896, Charles A. Birney, the plaintiff herein, succeeded to all the rights of the said McPherson, and was then the owner of the property mentioned in the complaint herein, and was the owner of said property at the time of the sale for

taxes mentioned in defendant's amended answer, and was the owner of the same at the time of the commencement of this action."

Upon the trial the court made the following conclusions of law: "(1) That the taxes assessed and levied upon the property in controversy in this action for the year 1896 by the assessor of Jefferson county, Montana, were assessed and levied according to law. (2) That the tax sale of said property to defendant by the treasurer of said Jefferson county, had on the 27th day of February, 1897, was made according to law. (3) That by said sale the ownership and right of possession to said property, and the whole thereof, passed to John J. Warren, the purchaser at said sale, and the defendant herein. (4) That said John J. Warren is now, and has been ever since said 27th day of February, 1897, the owner and entitled to the possession of all of said property." Judgment for costs in favor of the defendant was entered thereon, from which this appeal is taken.

Messrs. Toole & Bach, for Appellant.

Mr. E. H. Goodman, for Respondent.

MR. JUSTICE HOLLOWAY, after stating the case, delivered the opinion of the court.

The first conclusion of law made by the court is, in our judgment, erroneous. Under Section 3672 of the Political Code, all machinery used in mining, and all property and surface improvements upon or appurtenant to mines and mining claims, which have a value separate and independent of such mines or mining claims, shall be taxed as other personal property, and, as the property in controversy comes within the purview of this section, it was properly assessed as personal property. Section 3700 of the same Code provides that the assessor must ascertain the names of all taxable inhabitants and all property in his county subject to taxation, and must assess such property to the persons by whom it was owned or claimed, or in whose posses-

sion or control it was, at 12 o'clock m., on the first Monday of March next preceding. Section 3706 of the same Code provides that, if the owner or claimant of any property is absent or unknown, the assessor must make an estimate of the value of the property; and Section 3707 provides that, if the name of the absent owner is known to the assessor, the property must be assessed in his name; if unknown, it must be assessed to "unknown owners." The record discloses the fact that the property in question was assessed to the Queen Bee Mining Company. The corporation bearing that name had no existence whatever until after the sale of the property. The record further shows that the property was owned by this plaintiff and McPherson, both of whom were nonresidents unknown to the assessor. There is no showing in the record that any one had actual possession of the property on the first Monday of March, 1896, or that any one other than Birney and McPherson had constructive possession of it. The assessor, then, did not assess the property to the persons by whom it was owned on the first Monday of March of that year. He did, however, following the requirements of Section 3706, make an estimate of the value of the property, and then, notwithstanding Section 3707 required in this case that the property should be assessed to "unknown owners," he assessed it to the Queen Bee Mining Company, to whom he supposed the property belonged. The query then is, what is the effect of a mistake in the name of the owner of personal property upon the assessment so made? Section 3916 of the same Code provides: "When land is sold for taxes correctly imposed as the property of a particular person, no misnomer of the owner, or supposed owner, or other mistake relating to the ownership thereof, affects the sale, or renders it void or voidable." Applying to this section the rule of interpretation, "*Expressio unius est exclusio alterius*," the conclusion necessarily follows that, when personal property is sold for taxes imposed as the property of a particular person, a misnomer or mistake relating to the ownership thereof does vitiate the assessment, and renders the sale void; in other words, the provisions

of Sections 3700 and 3707 are mandatory, and, with the qualifications therein mentioned, require the assessor to assess personal property in the name of the real owner, if known; if not known, then to "unknown owners." (*People v. Whipple*, 47 Cal: 591; *Dowell v. City of Portland*, 13 Oregon, 248, 10 Pac. 308.) In *Crawford v. Schmidt*, 47 Cal. 617, in construing Section 13 of the Revenue Act of California of 1861, which provides that the assessor shall list and assess property to the person owning, claiming, or having possession or control of the same, and, if the name of such an absent owner is known to the assessor, the property shall be assessed in his name, and, if unknown to the assessor, the property shall be assessed to "unknown owners," the court makes this comment: "The statute is imperative that the property must be assessed to the owner, if known, and, if not, to unknown owners. In this case the assessment was not, and does not purport to have been, made to unknown owners. It cannot, therefore, be assumed that the name of the owner was unknown to the assessor. But instead of assessing the property to Caroline Schmidt, who was the owner, he assessed it to — Schmidt, a designation which would have applied as well to any other Schmidt, whether male or female, as to the real owner. We think this was not a compliance with the statute, and that the assessment and sale were void." In *Lake County v. Sulphur Bank Q. M. Co.*, 66 Cal. 17, 4 Pac. 876, the court, in construing Section 3628 and subsequent sections of the Political Code of California, held that a mistake in the name of the owner of real property does not invalidate the tax, but that an assessment of personal property to a named person other than the owner is absolutely void.

Neither is the defendant in this case in a position to complain of the harshness of this rule. The assessment and sale of property for delinquent taxes is a proceeding *in invitum*; the purchaser at such a sale buys at his peril, and the rule of *caveat emptor* applies. (*Lake County v. Sulphur Bank Q. M. Co.*, above; *Hecht v. Boughton*, 2 Wyo. 385.)

In conclusion we may say that the fourth conclusion of the

court, "that said John J. Warren is now, and has been ever since said 27th day of February, 1897, the owner and entitled to the possession of all of said property," is directly in conflict with and contradictory of the statement contained in paragraph 12 of the agreed statement of facts quoted above, which is that Birney was the owner of the property at the time of the commencement of this action (April 26, 1897). Section 1117 of the Code of Civil Procedure provides that the agreed statement of facts has the effect of special findings of fact, and we are of the opinion that a conclusion of law directly contradictory of a finding of fact would in itself suffice to vitiate a judgment entered thereon.

For the reasons herein set forth, the judgment appealed from is reversed, and the cause remanded for further proceedings not in conflict with the views herein expressed.

Reversed and remanded.

RUMNEY ET AL., RESPONDENTS, v. DONOVAN, APPELLANT.

(No. 1,920.)

(Submitted April 13, 1903. Decided April 27, 1903.)

*Receivers—Order of Appointment—Appeal — Supersedeas—
Return of Property—Contempt.*

1. Under the express provisions of Session Laws of 1899, p. 146, an *ex parte* order appointing a receiver is appealable.
2. An order of the supreme court staying proceedings under an order appointing a receiver requires the immediate return of the property to the person from whom it was taken.
3. Where, after an order of the supreme court staying proceedings under an order appointing a receiver, the receiver, in good faith and under advice of counsel, did not return the property to the person from whom it was taken, the question of whether or not the order staying proceedings operated to require such a return being previously unlitigated, the receiver was guilty of merely a technical contempt, and should be required to pay only a nominal fine.

Appeal from District Court, Lewis and Clarke County; J. M. Clements, Judge.

ACTION by Sarah F. Rumney, individually and as a guardian, against James Donovan, in which William T. Luddy was appointed receiver of certain property. Defendant appeals. On hearing of an order to show cause why the receiver should not be punished for contempt of court for failure to return the property to defendant after entry of an order suspending the order of appointment. Receiver adjudged guilty of contempt.

Mr. F. W. Mettler, for Appellant.

Mr. M. S. Gunn, and Mr. A. J. Galen, for Respondents.

Messrs. McConnell & McConnell, for the Receiver.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was commenced in the district court on February 13, 1903, by the plaintiffs, to foreclose an alleged vendor's lien upon certain personal property. In addition to this, the prayer of the complaint was that a receiver be appointed to take possession of such property. Upon application *ex parte*, the court on the same day appointed Wm. T. Luddy receiver, and directed him to take immediate possession of the property in controversy, consisting of certain stock cattle. From the order appointing the receiver the defendant Donovan appealed to this court, and upon his application an order was made by the justices of this court on February 14, 1903, staying all proceedings in the district court until the further order of this court, and particularly staying all proceedings under the order appointing such receiver. This order was made to be effective upon the appellant, Donovan, giving a sufficient undertaking, to be approved by the clerk of this court. Such an undertaking was approved and filed by the clerk on February 18, 1903.

On March 20, 1903, the respondents filed a motion to dismiss

the appeal on the ground that the order appointing the receiver, made *ex parte*, is not an appealable order. This motion was heard, considered, and denied by this court on the 30th day of March, 1903. On March 28th an application was made to vacate the order staying proceedings upon the ground that the order appealed from is not an appealable order, and because of certain defects in the record on appeal. On the same day an application was made by appellant to this court for an order directed to the receiver, requiring him to show cause, if any he had, why he should not be punished for contempt for refusing to return to the possession of the appellant the property in controversy, then in the possession of such receiver. The application was made upon affidavits setting forth the facts herein detailed, and the fact that, after filing the stay bond required of him by this court, appellant demanded the return of such property from the receiver, and the refusal of the receiver to comply therewith. An order to show cause was issued, and upon return thereof the cause was argued and submitted. The affidavit of the receiver, filed in answer to the order to show cause, raises no material issue of fact; and the only questions before this court for determination are whether the order made by this court staying proceedings in the lower court should be vacated, and whether such order operated, *ipso facto*, to require of the receiver a return of the property to the possession of the appellant, from whom it was taken.

1. Upon the first proposition we may say that, upon the motion to dismiss the appeal herein, this court considered the same matters as are now contended for upon this motion, and in refusing to dismiss the appeal we held that the order appointing the receiver, though made *ex parte*, was an appealable order, under Section 1722 of the Code of Civil Procedure, as amended by an act of the Sixth legislative assembly approved February 28, 1899 (Session Laws of 1899, p. 146), which provides: "An appeal may be taken to the supreme court from a district court in the following cases. * * * (2) * * * From an order appointing or refusing to appoint a receiver."

That decision became the law of this case upon that question, and we reiterate it now. Authorities have been cited in support of respondents' contention that no appeal lies from an order made *ex parte* appointing a receiver, but those decisions are by courts from states having different statutory provisions from ours, or from states whose statutes have not been called to our attention. To give to Section 1722 the construction asked for is to read into its language qualifying provisions not contemplated by the framers of the law. This we cannot do. The section gives the right of appeal from every order appointing a receiver, and that, too, in plain and explicit terms, which are not susceptible of a construction which would limit materially their operations. Upon suggestion of diminution of the record, the apparent defects in that regard have been cured.

2. Did the *supersedeas* operate, *ipso facto*, to require the receiver to return the property? We are of the opinion that it did. The effect of the stay was to suspend the operations of the order appointing the receiver. From the moment it became effective there was nothing which he could do under the order appointing him. His hands were stayed, so far as carrying out the order of the district court was concerned. That order required him to take immediate possession of the property, and when that order was suspended by the *supersedeas* the right of the receiver to retain such possession, as against the party from whom possession was obtained, ceased. "Where an appeal is taken from an order appointing a receiver, pending a determination of which a *supersedeas* is ordered or granted, the functions, powers, and duties of the receiver are thereby suspended." (23 Am. & Eng. Ency. of Law (2d Ed.), 1127; *Boston & Montana Consol. C. & S. M. Co., v. Montana Ore Purchasing Co. et al.*, 27 Mont. 431, 71 Pac. 471.) In *State ex rel. Railroad Co. v. Hirzel, Judge*, 137 Mo. 435, 37 S. W. 921, it was said: "We are obliged to hold that he (the judge) was in error in not requiring the receiver to let go when the appeal bond was approved and the appeal perfected. * * *. So the approval of the bond in the Spencer case operated to stay all proceedings

to enforce the receivership order; and, as incident to that stay, it had likewise the effect to release the property to the party from whom it had been taken by reason of the order of appointment of the receiver." *Farmers' Nat'l Bank v. Backus*, 63 Minn. 115, 65 N. W. 255, was a case wherein the receiver had taken possession before the appeal was perfected. Said the court: "The *supersedeas* does not undo or render nugatory any action of the receiver already had under the order before the appeal was taken and the bond duly filed, but it terminates the right of the lower court and its officer from further acting in the matter. It suspends the operation of the order, or, as has been said, 'paralyzes' the arm of the receiver. His authority to proceed is absolutely stayed and suspended by operation of law. The rights and powers of the receiver being suspended, of which he was duly notified, he should have restored possession of the premises to the appellant; for, his authority to take being inoperative by the suspension, his authority to hold was equally so, both being derived from the same order. The legal effect of the appeal and *supersedeas* was to withdraw from the receiver the right to the possession of the property, and vest that right in the party from whom it had been taken." (*State v. Johnson*, 13 Fla. 33; *Continental N. B. & L. Ass'n v. Scott*, 41 Fla. 421, 26 South. 726.) There is nothing in the language used by this court in *Forrester & MacGinniss v. Boston & Montana Consol. C. & S. M. Co.*, 22 Mont. 430, 56 Pac. 868, in conflict with the views herein expressed. The application for an order vacating the order staying proceedings is denied.

Inasmuch, however, as the receiver apparently acted in perfect good faith, under advice of counsel, and with reference to a question not heretofore passed upon in this jurisdiction, and upon this hearing manifested a disposition to cheerfully comply with the order of this court, we deem the contempt committed a technical one, and are not disposed to impose any hardship upon the receiver.

The order of this court is that the receiver, Wm. T. Luddy,

be, and he is hereby, adjudged guilty of contempt of this court, and his punishment fixed at a fine of \$1—the amount of the costs incurred in this proceeding.

KING, RESPONDENT, v. PONY GOLD MINING COMPANY ET AL., DEFENDANTS; MORRIS ET AL., APPELLANTS.

(No. 1,514.)

(Submitted April 6, 1903. Decided April 27, 1903.)

Appeal—Record on Appeal—Notice of Intention to Move for New Trial—Practice—Stare Decisis—New Trial—Striking Attorneys' Names from Answer—Discretion—Affidavits—Insufficiency of Evidence—Record—Review—Pleading—General Denial—Waiver—Suits in Equity—Instructions—Evidence—Harmless Error—Corporations—Liability of Stockholders—Actions—Statute of Limitations—Briefs.

1. The notice of intention to move for a new trial is not a necessary part of the record on appeal from an order denying a new trial unless some objection is presented to the notice in the trial court which the party making desires to have the supreme court pass upon.
2. Where the court has fallen into error upon a question of practice, and the correction of that error can in no way or manner injure any litigant in pending cases, the decision making the mistake should be overruled and the true and correct practice stated.
3. Under Code of Civil Procedure, Section 1172, providing that, when a motion for a new trial is based on error in the exercise of the trial court's discretion, the motion must be made on affidavits, alleged error in striking certain attorneys' names from the answer cannot be considered on appeal where the record contains no affidavits.
4. Sufficiency of the evidence to support the decree cannot be considered where it does not appear from the certificate of the trial judge settling the statement, or from the statement or bill of exceptions, that the record contains all the evidence or its substance.
5. Where the statement on motion for a new trial stated that plaintiff called certain witnesses, who testified as therein set forth and "plaintiff rested," and that defendant called certain witnesses, whose testimony was also given, "whereupon defendants rested," it was not made to appear that all the evidence given was contained in the record.
6. Alleged insufficiency of a general denial cannot be first raised on appeal.

7. On appeal in a suit in equity, alleged error in instructions cannot be considered; the verdict being merely advisory.
8. Where, in appellant's original brief and in the oral argument, no reference was made to error in refusing to grant a motion for a nonsuit, an assignment based on such refusal will be considered waived.
9. Admission of incompetent evidence in an equity case is not reversible error, it being presumed that the court considered competent evidence only, except where it clearly appears from the record that the court actually considered the incompetent evidence in making up its findings, or where the record—containing all the evidence—does not disclose sufficient competent evidence to warrant the findings.
10. Where the record does not purport to contain all the evidence, it will be presumed that there was sufficient competent evidence to support the decree.
11. In a suit against stockholders of a corporation, defendants could not allege error in the admission in evidence of the report of a stockholders' meeting, when by subsequent amendment of their pleadings they admitted the existence of the evidence objected to.
12. Assignments of error in sustaining objections to certain questions cannot be considered where there is no showing as to what the answers would have been, and the questions give no indication of the specific evidence sought to be adduced.
13. Under Compiled Statutes of 1887, Division V, Section 457, providing that the stockholders of every company incorporated under the act shall be liable to the creditors of the company to the amount of unpaid stock held by them, etc., the liability of the stockholders arises only after execution on a judgment against the corporation has been returned unsatisfied, and limitations do not begin to run against an action against the stockholders until such time.

Appeal from District Court, Lewis and Clark County; H. C. Smith, Judge.

Suit by Rockwell King against the Pony Gold Mining Company, Samuel T. Hauser, William W. Morris, and Henry Elling. Judgment against Morris and Elling, and from the judgment and an order denying a new trial they appeal. Afterwards Elling died, and Thomas Duncan and others were substituted, as executors, in his place and stead. Affirmed.

STATEMENT OF THE CASE BY THE COMMISSIONER PREPARING
THE OPINION.

This is an appeal from the final judgment, and from an order overruling a motion for a new trial, in a suit brought by a judgment creditor of the Pony Gold Mining Company against Henry Elling, William W. Morris, and Samuel T. Hauser, as stockholders of said company, to recover an amount alleged to be due and unpaid upon the capital stock of the company held

or owned by said defendants, to be applied in the liquidation of said judgment. The Pony Gold Mining Company is also made a party defendant to the suit. The theory upon which plaintiff claims that there is an amount unpaid upon said defendants' stock is that practically the entire capital stock of the company was issued and delivered to said defendants Elling and Morris, as full-paid stock, for the purchase of certain property by the company, the value of which is alleged to have been far below the par value of said capital stock. It is alleged that the company issued and delivered to said defendants 499,991 out of 500,000 shares of the capital stock of said company (the par value being \$10 per share) in payment for certain property which plaintiff claims was not worth over \$250,000. It is also alleged that, in addition to the issuance and delivery of said stock, the company paid the defendants Elling and Morris \$50,000 in cash, and executed and delivered a mortgage to them upon the property thus purchased for the sum of \$150,000. The record discloses that at the conclusion of plaintiff's case a motion for nonsuit made by the defendants was submitted to the court, which was sustained as to defendant Hauser, but denied as to defendants Elling and Morris. By this action of the court, defendant Hauser was eliminated from the case, and it proceeded to a final judgment against defendants Elling and Morris. The action was one in equity, and upon the trial certain special issues were submitted to the jury. The jury returned findings upon these issues in favor of plaintiff, which were adopted by the court. The court then made additional findings in plaintiff's favor, entered judgment against defendants Elling and Morris, and denied their motion for a new trial. From this action of the court, defendants Elling and Morris appealed to this court.

After the appeals were perfected, appellant Henry Elling died, and, by order duly entered, Thomas Duncan, Mary B. Elling, Mabel M. Hutt, and the Union Bank & Trust Company were substituted herein, as executors, in his place and stead.

For brevity, we will refer to the appellants as Elling and Morris in the following opinion.

Mr. Robert B. Smith, Mr. W. A. Clark, and Messrs. Cullen, Day & Cullen, for Appellants.

The court erred in striking out the new matter in the answer of the defendants Elling and Morris, relating to the statutes of limitations. (Wood on Statute of Limitations, Sec. 149; 1 Cook on Corporations, Sec. 225; Thompson on Liability of Stockholders, Secs. 292, 293; Compiled Statutes, 1887, First Div. Sec. 20; *Longley v. Little*, 26 Me. 162; *Hunt v. Ward*, 99 Cal. 612, 34 Pac. 335; *Kelly v. Clark*, 21 Mont. 291-342; *Powell v. Oregonian Ry. Co.*, 36 Fed. 726; *Stilphon v. Ware*, 45 Cal. 110; *Herman v. Coleman*, 23 Pac. Rep. 62; *Reddington v. Cornwall*, 90 Cal. 49, 27 Pac. 44; *Bank v. Pacific Coast Steamship Co.*, 103 Cal. 574, 37 Pac. 499; *Jaggers Iron Co. v. Walker*, 76 N. Y. 521; *Hardman v. Sage*, 124 N. Y. 25, 26 N. E. 354; *Close v. Potter*, 49 N. E. 686; *Patterson v. Thompson*, 86 Fed. 85; *Blake v. Clausen*, 38 N. Y. Supp. 514; *Bassett v. Hotel Co.*, 47 Vt. 314; *Sullivan v. Manufacturing Co.*, 20 S. C. 79; *Losee v. Bullard*, 79 N. Y. 404; *Rector of Trinity Church v. Vanderbilt*, 98 N. Y. 170; *State Savings Bank v. Johnson*, 18 Mont. 440.)

There was no statute of the territory of Montana in force at the time when these transactions took place, which would require the plaintiff to recover judgment against the corporation before suing the stockholders, and we think this court will not now establish such a doctrine. There are numerous authorities to the effect that suit may be brought against a stockholder without bringing suit against the corporation. (*Terry v. Tubman*, 92 U. S. 156; *Camden v. Doremus*, 3 How. 516-533; *Stutts v. Handley*, 41 Fed. 531; *First National Bank v. Green*, 64 Iowa, 445; *Cleveland v. Marine Bank*, 17 Wis. 545; *Samainego v. Stiles*, 20 Pac. 607; *Barrack v. Gifford*, 24 N. E. 259.)

Mr. T. J. Walsh, and Mr. F. P. Sterling, for Respondent.

The statute of limitations begins to run when the plaintiff's cause of action accrues or ripens. The appellants contend that the plaintiff's cause of action against them as stockholders in the Pony Gold Mining Company came into existence and was perfect immediately upon the accruing of the original indebtedness against the corporation in 1889. We say that it did not come into existence until the plaintiff had reduced his claim to judgment and had exhausted his remedies for the collection of the same from the corporation. (*Kelly v. Clark*, 21 Mont. 291; *Thompson on Liability of Stockholders*, Secs. 32, 36, 37; *Cuykendall v. Corning*, 88 N. Y. 129; *Handy v. Draper*, 89 N. Y. 334; *Rocky Mountain Bank v. Bliss*, 89 N. Y. 338; *Hardman v. Sage*, 124 N. Y. 25; *Christenson v. Quintard*, 36 Hun. 334; *Bains v. Babcock*, 27 Pac. 674; *Walter v. Merced*, 59 Pac. 136; *Vermont Marble Co. v. Declez Granite Co.*, 67 Pac. 1057; 2 *Spelling on Corporations*, 823; *Gillin v. Sawyer*, 44 Atl. 677; *Powell v. Ry. Co.*, 38 Fed. 187; *Wehn v. Fall*, 76 N. W. 138; *Hawkins v. Glenn*, 131 U. S. 319; *Hatch v. Dana*, 101 U. S. 205-214; *Thompson's Commentaries*, 3770; 2 *Beach on Private Corporations*, 569; 1 *Cook on Corporations*, 195-225f; *Clark on Corporations*, 239; *Crofoot v. Thatcher*, 57 Pac. 171; *Jones v. Whitworth*, 94 Tenn. 602; *Merritt v. Reid*, 10 Daly, 310; *Trustee v. Semple*, 80 Ala. 159; *Allibone v. Hager*, 46 Pa. St. 48; *Scoville v. Thayer*, 105 U. S. 143; *Thompson on Liability of Stockholders*, 291; *Younglove v. Lime Co.*, 33 N. E. 234; *Bronson v. Schneider*, 33 N. E. 233; *Hardman v. Sage*, 124 N. Y. 25.)

MR. COMMISSIONER CLAYBERG prepared the opinion for the court.

Before entering upon a consideration of the questions involved in this appeal, it is important to consider some of the preliminary objections presented by respondent's counsel to the record of the case, and to certain points relied upon by appellants in their brief. A great many questions are sought to be

raised in appellants' brief, many of which are objected to, and it seems to be the duty of the court to sift these objections, and determine what questions are properly before the court for consideration. These preliminary objections are as follows: (1) That this court cannot consider any alleged errors involved in overruling the motion for a new trial, as there is no notice of intention to move for a new trial in the record. (2) That this court cannot consider the alleged error involving the striking of Cullen, Day & Cullen from the separate answer of defendant Hauser, because such error is an irregularity of the court below, which can only be presented to this court by affidavits filed with the court below on the motion for a new trial, and no such affidavits appear in the record. (3) That this court cannot consider the alleged errors assigned upon the insufficiency of the evidence, because the record does not disclose that it contains all of the evidence introduced at the trial, or the substance thereof. (4) That this court cannot consider whether the property conveyed by defendants to the company is of any other value than that alleged in the complaint, because defendants' denial of such allegations was general. (5) That this court cannot consider the errors assigned upon the instructions of the court to the jury, given or refused, because the case is one in equity, and in equitable cases this court cannot review the instructions given or refused. We shall consider these objections *seriatim*.

1. As to the absence of notice of intention to move for a new trial:

In this case the record on appeal contains nothing aside from a statement of the case, properly settled and signed, and the judgment roll. The notice of intention to move for a new trial is entirely omitted, and the question is whether this omission is proper. The consideration of this question is necessarily limited to the conditions presented by the record in this case, and to none other, and this court desires to be understood that this opinion shall be construed as applicable only to similar conditions and cases. For a full elucidation of the question, a reference to the statute seems necessary.

Under Section 1171, Code of Civil Procedure, a motion for a new trial may be based upon one or more of seven grounds therein stated. Section 1172 provides that when the application is made for a cause mentioned in the first, second, third and fourth grounds, stated in Section 1171, it must be upon affidavits, and if upon other grounds, either upon a bill of exceptions or statement of the case, at the option of the moving party. Section 1173 provides that within ten days after the verdict of the jury, or notice of the decision of court or referee, the party intending to move for a new trial must file with the clerk and serve upon the adverse party a notice of his intention, "designating the grounds upon which the motion will be made." Subdivision 3 of Section 1173 further provides: "When the notice of the motion designates as the ground of the motion the insufficiency of the evidence to justify the verdict or other decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient. When the notice designates as the ground of the motion errors in law, occurring at the trial and excepted to by the moving party, the statement shall specify the particular errors upon which the party will rely. If no such specifications be made the statement shall be disregarded on the hearing of the motion."

It is apparent from the foregoing provisions of the Code that the only purposes of the notice of intention to move for a new trial are (1) to notify the adverse party of the grounds upon which the motion will be based; and (2) to guide the judge or referee in the settlement of the statement when proposed, in only allowing such grounds of motion to be stated or claimed therein as are set forth and relied upon in the notice of intention. When the statement is prepared in pursuance of the notice, it must specify particularly the insufficiency of the evidence, and the particular errors of law relied upon in the notice of intention. It is then made the duty of the judge or referee to "make the statement truly represent the case," and to settle and sign the same. In order that the statement "truly repre-

sent the case," the judge or referee must not allow to be included therein any grounds of motion not stated in the notice of intention and relied upon by the moving party. The notice of intention must therefore be referred to and considered in settling the statement, and if there is any objection to its form or substance, or if it has not been filed or served in time, such objections should be then presented, and the proper reference thereto should be inserted in the statement, so that the higher court, upon appeal, may consider and pass thereon. When the statement is settled, all the functions and offices of the notice of intention have been performed, and it need only be incorporated in the statement in cases where some point involving its consideration is desired to be presented to the supreme court. In all other instances there is no occasion to present it to the higher court. There having been no question raised in this record concerning the notice of intention, there was no occasion for it to be brought to this court.

We find the former decisions of this court in great confusion, as to whether the record on appeal from an order granting or refusing a motion for a new trial should contain the notice of intention. The first case where the question was considered is that of *First National Bank v. McAndrews*, 5 Mont. 251, 5 Pac. 879, where a motion was made to strike the statement on motion out of the transcript "for the reason that there is nothing in the record to show that there was either a motion for a new trial filed, or a notice thereof served upon the adverse party, as required by Section 287 of the Code of Civil Procedure." This court sustained the motion, and held that a decision upon motion for a new trial may not be reviewed on the record when the record does not show that any motion for a new trial was filed in the lower court, nor that any notice of motion, designating the errors complained of, was filed or served upon the adverse party. This decision was adopted and indorsed in the case of *Gum v. Murray*, 6 Mont. 10, 9 Pac. 447. It was next cited with approval in *Arnold v. Sinclair*, 12 Mont. 248, 29 Pac. 1124.

These decisions were all made while there was a statute in force requiring the appellant to furnish to this court, on orders appealed from in new trial proceedings, among other things, "a copy of the papers used on the hearing in the court below." (Section 425, Code of Civil Procedure, Revised Statutes of 1879; Section 438, Code of Civil Procedure, Compiled Statutes of 1887.)

In 1895 the legislative assembly enacted the present Code of Civil Procedure, and by Sections 1176 and 1738 made a new requirement as to the papers necessary to be sent to this court on appeals from orders granting or refusing new trials. Section 1176 provides: "The judgment roll, and the affidavits, or bill of exceptions or statement, as the case may be, used on the hearing, with a copy of the order made, shall constitute the record to be used on appeal from the order granting or refusing a new trial." Section 1738 provides: "On an appeal from an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, of the order appealed from, and of the papers designated in Section 1176 of this Code." Under these sections, it is very apparent that the only papers properly constituting the record on appeal in the present case are the judgment roll, the statement, the order appealed from, and the notice of appeal.

Recalling the fact that under Section 425, Code of Civil Procedure, Revised Statutes of 1879, and Section 438, Code of Civil Procedure, Compiled Statutes of 1887, the papers constituting the record were a copy of the notice of appeal, the undertaking on appeal, the order appealed from, and "a copy of the papers used on the hearing in the court below 'certified' by the attorneys, of the parties to the appeal or by the clerk, to be correct," we must conclude that, under the old practice, if the notice of intention was used in the court below on the hearing, a copy was required to be included in the record, certified to be correct, as provided by the statute. (*Arnold v. Sinclair*, 12 Mont. 248, 29 Pac. 1124.)

Under the present statutes, the only way in which the notice

of intention can be brought before this court is by insertion in the statement or in the bill of exceptions. It has a proper place in the statement or bill, as we have above seen, only when some objection is made to its sufficiency at the time of the settlement of the statement or bill, and therefore, unless some such objection is presented to the notice of intention at that time, so that it becomes necessary to incorporate it in the statement or bill, it has no place in the record on appeal.

In determining this question, it is very important to refer to the statutes and decisions of the supreme court of the state of California, because we find that in that state the same statutes were enacted, and the same questions arose as arise here, and had been definitely settled by the court of last resort of that state long prior to the adoption of our present Code of Civil Procedure, as hereinafter stated. Section 346, c. 5, p. 106, of the Laws of California of 1851, and Section 32, c. 54, p. 64, of the Laws of 1854, were practically identical with our Section 425, Code of Civil Procedure, Revised Statutes of 1879, and Section 438, Code of Civil Procedure, Compiled Statutes of 1887. Under the Laws of 1851 and 1854, *supra*, the supreme court of California held (as this court held under Section 425, Code of Civil Procedure, Revised Statutes of 1879, and Section 438, Code of Civil Procedure, Compiled Statutes of 1887), that the notice of intention was a necessary part of the record on appeal from an order granting or refusing a motion for a new trial. (*Calderwood v. Brooks*, 28 Cal. 151; *Wright v. Snowball*, 45 Cal. 654.) The legislature of California in the year 1874 adopted a new Code of Civil Procedure, changing the provisions of the old Code concerning the record on appeal from orders granting or refusing new trials, and substituting the present Sections 661 and 952 for Section 346. These last sections did away with the requirement of certifying to the supreme court the papers used on the hearing of motion for a new trial in the court below, and only required the papers mentioned in those sections to become parts of the record. The supreme court of California, in *Dominguez v. Mascotti*, 74 Cal.

269, 15 Pac. 773, uses the following language: "Formerly the notice was part of the record on appeal. But by careless legislation it is no longer so." The same court also said in *Pico v. Cohn*, 78 Cal. 384, 20 Pac. 706: "Formerly the notice was made a part of the record on appeal by express statutory provisions. But it is not so under the present Code. (Code of Civil Procedure, Sec. 670; *Girdner v. Beswick*, 69 Cal. 112, 10 Pac. 278; *Dominguez v. Mascotti*, 74 Cal. 269, 15 Pac. 773.) Nor is there any provision of the Code requiring that such notice shall be brought to this court by including it in the statement, or in any other manner. The papers necessary to be brought up are set out in Sections 661 and 952 of the Code of Civil Procedure, and the notice of intention is not one of them. The former statute having made the notice of intention a part of the record, we must assume that it was omitted from the present Code with a purpose. Being omitted from the section providing what papers shall constitute the record on appeal, and no provision being made for bringing it up in any other way, it is fair to presume that it was not intended to require it to be brought to this court at all. This leads us to the conclusion that it was the legislative intention that the notice should be the basis of the motion to be made in the court below, and that, upon the proper statement being filed, and the necessary motion made and passed upon by the court below, the notice has performed its functions, and is not a necessary part of the record on appeal, or to be presented here in any form. When the case comes to us, we must look to the statement or bill of exceptions, and the specifications in which the decision of the court below is not sustained by the evidence, and the specifications of errors of law, as our guide in reviewing the case, and to these alone. If a question is presented by such specifications, and is properly saved in the statement or bill of exceptions, this court will look no further, but must presume that the question was properly presented to the court below, and passed upon in its ruling upon the motion for a new trial. We do not put this upon the ground of waiver by the opposite party, as is done in some of the earlier

cases, but upon the sole ground that we must look alone to the statement or bill of exceptions for the questions to be determined, in the absence of any showing by the respondent that no notice, or an insufficient one, was given. Undoubtedly the notice of intention is necessary, but if it has not been given, or has been given too late, that must be shown by the respondent, as against the settlement of the statement or bill of exceptions, or at the time of and in opposition to the motion for a new trial; and, if the court below rules against him, he must cause the facts necessary to present the question to be then included in the statement or a proper bill of exceptions, so that this court can determine whether a proper notice has been given or not. The specifications in the statement or bill should conform to the notice of intention to move for a new trial. If they do not, the opposite party should move such amendments thereto as will remove therefrom all matter foreign to the grounds stated in the notice, and in settling the same the court below should see that the statement does not go beyond the notice, either in the body of it or in the specifications. If this is done, and the statement or bill is properly made up, no injury can result to any one from the failure to bring up the notice."

In 1895, as above stated, our legislature also enacted new provisions in regard to the papers which shall constitute the record on appeals from orders granting or refusing new trials. (See Sections 1176, 1738, Code of Civil Procedure.) By the adoption of these two sections the legislative assembly enacted practically the identical provisions of Sections 661 and 952 of the Code of Civil Procedure of California. The supreme court of that state has, since the adoption of their Code in 1874, frequently decided that the notice of intention need not be a part of the record on appeal. (*Ferrer v. Home Mutual Ins. Co.*, 47 Cal. 427; *Hook v. Hall*, 68 Cal. 22, 8 Pac. 596; *Dominguez v. Mascotti*, 74 Cal. 269, 15 Pac. 773; *Pico v. Cohn*, 78 Cal. 384, 20 Pac. 706.)

All these decisions were made subsequent to the adoption of the Code of California of 1874, and prior to the change in our

Code of Civil Procedure. We having adopted Sections 1176 and 1738 from the Code of California, under the decisions of this court we must be held to have adopted such sections with the construction theretofore placed upon them by the highest court of the state of California. (*Davenport v. Kleinschmidt*, 6 Mont. 502-538, 13 Pac. 249; *First Nat'l Bank v. Bell S. & C. M. Co.*, 8 Mont. 32, 19 Pac. 403; *Stackpole v. Hallahan*, 16 Mont. 40, 40 Pac. 80; *Murray v. Heinze*, 17 Mont. 353, 42 Pac. 1057, 43 Pac. 714; *Largey v. Chapman*, 18 Mont. 563, 46 Pac. 808; *Sharman v. Huot*, 20 Mont. 555, 52 Pac. 558, 63 Am. St. Rep. 645; *Stadler v. First Nat'l Bank*, 22 Mont. 190, 56 Pac. 111, 74 Am. St. Rep. 582; *Butte & Boston Consol. Mining Co. v. M. O. P. Co.*, 25 Mont. 41, 63 Pac. 825.)

Unfortunately, however, the California decisions above referred to were not called to the attention of this court when the question was first presented to it for consideration under the provisions of the Code of 1895, and by various decisions rendered since that time it has been held that the notice of intention is a necessary part of the record on appeal, and must come up in the statement. (*Grinnell v. Davis*, 20 Mont. 222, 50 Pac. 556; *Harrigan v. Lynch*, 21 Mont. 36, 52 Pac. 642; *Carr, Ryder & Adams Co. v. Closser*, 25 Mont. 149, 63 Pac. 1043; *In re Reilly's Estate*, 26 Mont. 358, 67 Pac. 1121; *Madigan v. Harrington*, 26 Mont. 358, 67 Pac. 1121; *Carr, Ryder & Adams Co. v. Closser*, 27 Mont. 94, 69 Pac. 560.)

This court has also held that the filing and service of this notice, and the omission thereof from the statement, if filed and served, is waived if the adverse party appears at the settlement of the proposed statement and offers amendments thereto. (*Harrigan v. Lynch*, 21 Mont. 36, 52 Pac. 642; *In re Reilly's Estate*, 26 Mont. 358, 67 Pac. 1121.) By such decisions this court tacitly admits that the omission of the notice from the record is not jurisdictional. Is not such holding tantamount to saying that the insertion of the notice in the statement is only jurisdic-

tional in cases where this court is requested to pass upon some question as to the validity or sufficiency of the notice itself, or as to its effect? We have seen that in such instances the party raising such question must cause the notice and his objections thereto to be incorporated in the statement or bill of exceptions.

We are of the opinion, after a careful and conscientious investigation and consideration of the statute, and cases upon similar statutes in other jurisdictions, that the functions of the notice of intention to move for a new trial are fully exhausted when the statement of the case or bill on such motion is settled, and that it has no further force or effect, except in cases where an objection is made to it upon the settlement of the statement which the party making desires to have this court pass upon. This court, in *Carr, Ryder & Adams Co. v. Closser*, 27 Mont. 94, 69 Pac. 560, recognizes the correctness of the California decisions, as shown by the following language: "Sections 1176 and 1738, *supra*, were adopted from the statutes of California after the supreme court of that state had interpreted them in *Pico v. Cohn*, 78 Cal. 384, 20 Pac. 706. While *Harrigan v. Lynch* and *In re Reilly's Estate*, *supra*, were under advisement, the members of this court examined the transcript in *Grinnell v. Davis*, *supra*, and found that the new trial proceedings were instituted after these sections had become law. It is probably true that in *Grinnell v. Davis* this court should have followed the interpretation which had been placed upon similar sections by *Pico v. Cohn*, and that an injustice was worked by not following it. Doubtless the court would have conformed to the practice established by *Pico v. Cohn*, had it been advised of that decision."

This leaves a single question for determination upon this branch of the case, and that is whether, under all the circumstances, the court will now correct the doctrine as laid down in *Carr, Ryder & Adams Co. v. Closser*, *supra*. This court, in the case of *Wetzstein v. Boston & Montana Consol. C. & S. Mining Co.*, 25 Mont. 135, 63 Pac. 1043, in treating of a question of practice, uses the following language: "The rule of *stare de-*

cisis does not here control, as it is not unusual, but proper, in matters of practice, to establish a correct and legal practice, if an error has been committed ill-advisedly in a former opinion of this court, provided that it is apparent that no substantial injury will be suffered by litigants by reason of reliance upon the precedent." In this opinion the court does not refer to the case of *Ramsey v. Burns*, 24 Mont. 234, 61 Pac. 129, in which this court uses the following language: "Decisions upon mere matters of practice, or interpretations of what may perhaps not improperly be called 'adjective law,' should never be disturbed unless it be apparent that injustice would result from adherence thereto." But it is well to note that the rule of practice affirmed in that case was one which, if changed by the court, would entail hardship upon litigants whose appeals had been taken to, and were pending in, this court. The principle of practice reaffirmed was in relation to the validity of bonds on appeal, and clearly, if the court overruled a former decision holding bonds on appeal of a particular form to be valid, all appeals in which a similar bond was filed would have to be dismissed, and thus very serious hardship would be inflicted upon appellants who had taken their appeals in reliance upon the good faith of a decision of the supreme court of the state. This court again said, in the case of *Carr, Ryder & Adams Co. v. Closser*, 27 Mont. 94, 69 Pac. 560: "That decisions upon mere matters of practice be not disturbed, even if erroneous, is of prime importance. It is most desirable that the practice be settled and known. Unless it be apparent that injustice will likely result from adherence to such decisions (*Ramsey v. Burns*, 24 Mont. 234, 61 Pac. 129), or that a change will not work a wrong, they should not be disturbed. Only the most cogent reasons can justify a court in overturning them." It will be noticed that *Wetzstein v. Boston & Montana Consol. C. & S. Mining Co.*, *supra*, is not referred to in this decision. We thus see that this court has fallen into an inconsistency in the decisions of the three cases last cited, but we believe the true rule to be that if the court has fallen into error upon a question of

practice, and the correction of that error can in no way or manner injure any litigant in pending cases, the decision making the mistake should be overruled, and the true and correct practice stated.

Chief Justice Johnson, of the court of appeals of New York, in a dissenting opinion in the case of *Leavitt v. Blatchford*, 17 N. Y. 521-544, seems to state the rule correctly in the use of the following language: "To depart from a decision is undoubtedly an act by which a court incurs a high degree of responsibility, and it should certainly be satisfied that its course is such that the future judgment of the enlightened profession of the law will approve its determination. But when it is satisfied that an erroneous determination has been made, and that, too, with a full consideration of the merits of the question decided; when it sees that to correct it will render void no one's honest acts, nor disappoint any just expectation; when, in short, it is fully persuaded that there is no one reason why such a decision should again be made, except that it was once made before—then I think the court would be sacrificing substance to shadow if it refused to correct its error. Nor do I believe that by so doing a court would disturb the public confidence in the stability of its judgments. Courts are not inclined, any more than men out of courts, to admit that they have erred; and where the administration of justice is public, and must proceed upon reasons assigned for every judgment, there is little danger from the exercise, under the responsibilities necessarily attending its exercise, of the power which a court possesses to retrace its steps when it is satisfied that an error has been committed."

2. As to striking the names of Cullen, Day & Cullen, as attorneys, from the answer of defendant Hauser:

We are of the opinion that this alleged error is not properly presented upon this appeal, for the following reasons, viz.: The statutes provide that, when the motion for a new trial is based upon this ground, it must be made upon affidavits. (Section 1172, Code of Civil Procedure.) No affidavits of this character appear in the record. This court has said, in *Cole-*

man v. Perry, 28 Mont. 1, 72 Pac. 42: "If error was committed, it was because of the irregularity or abuse of discretion on the part of the trial court in thus freely expressing before the jury an opinion upon the probable effect of evidence. If the language of the court so used constituted error, it is one of the designated causes for which a new trial may be granted. (Section 1171, Subd. 1, Code of Civil Procedure.) However, such error can only be shown by affidavit; otherwise it is not properly in the record or before this court (Section 1172, Code of Civil Procedure); and, as the alleged error was not so saved, consideration of the matter is not properly before this court upon this hearing."

3. As to the alleged insufficiency of the evidence:

We are of the opinion that none of these errors are properly before the court for consideration. The record does not positively or even inferentially disclose that it contains *all* the evidence introduced at the trial below, or the substance thereof, bearing upon the errors assigned. This court, in the case of *State v. Shepphard*, 23 Mont. 323, 58 Pac. 868, had occasion to state very fully and clearly the law relative to the requirement that the record disclose all the evidence introduced at the trial below, or its substance, applicable to the errors assigned, in order to present the question of the insufficiency of the evidence to this court. A reference to that case upon this point would seem sufficient for the purposes of this opinion, without making extensive quotations therefrom.

A brief restatement of the law is as follows, viz.: This court cannot consider errors assigned upon insufficiency of the evidence to sustain the findings or judgment in cases where the record does not disclose that all the evidence introduced before the trial court, or its substance, bearing upon the errors assigned, is contained therein. (*State v. Shepphard*, 23 Mont. 323, 58 Pac. 868; *Currie v. Mont. Cent. Ry. Co.*, 24 Mont. 123, 60 Pac. 989; *T. C. Power & Bro. v. Stocking*, 26 Mont. 478, 68 Pac. 857.)

Under the authorities above cited there seem to be two ways by

which the record can explicitly disclose that it contains all the evidence, or the substance thereof, bearing upon the errors assigned, which was introduced in the court below, viz.: (1) The certificate of the trial judge settling the statement on motion for a new trial or bill of exceptions; and (2) from the statement or bill of exceptions itself.

The certificate of the trial judge to the statement on motion for a new trial in this case is as follows: "I, Henry C. Smith, judge of said district court, do hereby certify that the defendants having proposed a statement, and the plaintiff having offered certain amendments thereto, the same were settled by me, and engrossed in the foregoing statement, consisting of 117 typewritten pages, and the same is hereby allowed by me, and is correct. Done this 22d day of September, A. D. 1899. Henry C. Smith, Judge."

It will be perceived that this certificate is entirely silent as to the contents of the statement, save as to the number of pages it contains. No reference is made to the evidence, or the substance thereof. We find no declaration, or even inference, in the body of the statement on motion for a new trial, tending to show that all the evidence, or its substance, bearing upon the errors assigned, is contained therein. It commences as follows: "Be it remembered that on the 16th day of June, A. D. 1899, that being one of the days of the court, the plaintiff, to maintain the issues on his part, called and had sworn one Samuel T. Hauser, who testified as follows." Following this appears the testimony of witness Hauser. When his testimony was concluded, other witnesses were sworn, and at the completion of plaintiff's testimony the recital appears: "Plaintiff rested." Then it appears that certain motions for nonsuit were submitted to, and disposed of by, the court, which is followed by the recital: "And the said defendants, to maintain the issues on their part, called A. J. Seligman, who testified as follows." Other witnesses were called for the defendants, and at the conclusion of their examination we find the recital, "Whereupon defendants rested."

This court, in the case of *State v. Shepphard*, *supra*, after a careful review of the authorities on the statement or motion for a new trial in that particular case, uses the following language, which we adopt as conclusive in this case: "But it is not at all clear by this record that there was no other evidence before the jury than that included in the record, and, in the absence of an affirmative showing of a connected narrative or a positive statement that the entire evidence is therein, defendant has failed to avail himself of the point he would rely on."

4. As to the sufficiency of the general denial of allegations of value:

We are of the opinion that this court cannot consider this suggestion. Both parties to the suit tried the case upon the theory that this denial was sufficient. Testimony was introduced pro and con. This court said in the case of *Hamilton v. Huson*, 21 Mont. 9, 53 Pac. 101, "in the court below the parties treated the denial (a general one) as good and sufficient, and the case was tried on that understanding. This question cannot be raised now, the parties having treated the pleading as sufficient in the court below." See, also, *Sweeney v. Great Falls & Canada Ry. Co.*, 11 Mont. 523, 29 Pac. 19, and cases cited.

5. As to the errors assigned upon the instructions to the jury:

We are of the opinion that none of these errors can be considered on this hearing. This is an equity case, and the law is well settled, by various decisions of this court, that the verdict of the jury is merely advisory to the court, and that this court will not review errors assigned upon the instructions of the court to the jury. It is therefore no longer an open question in this state. (*Lawlor v. Kemper*, 20 Mont. 13, 49 Pac. 398, and cases cited; *Sanford v. Gates, Townsend & Co.*, 21 Mont. 277, 53 Pac. 749, and cases cited.)

Counsel assign as error the ruling of the court below in refusing to grant their motion for a nonsuit. In the argument in the original brief filed by them, we find no reference to, or reliance upon, this alleged error. No reference was made to it

in the oral argument. Under these circumstances, this error is presumed to have been waived, and will not be considered by the court. (*Murray v. Mont. L. & M. Co.*, 25 Mont. 14, 63 Pac. 719; *Maloney v. King*, 25 Mont. 138, 64 Pac. 351; *Anderson v. Cook*, 25 Mont. 330, 64 Pac. 873; *Matusevitz v. Hughes*, 26 Mont. 212, 66 Pac. 939, 68 Pac. 467; *Hayes v. Union Merc. Co.*, 27 Mont. 264, 70 Pac. 975.)

We therefore conclude—distinguishing the substantial from the unsubstantial, the substance from the shadow, in the record presented—that there are only two questions properly presented to this court for consideration, viz.: (1) Was error committed in the admission or rejection of evidence? (2) Was error committed in the rulings of the court below upon the question of statute of limitations, as pleaded by defendants?

As to the evidence:

Numerous errors are assigned as to the admission of what is claimed to have been incompetent evidence, but, under the view of the case which we have taken, all of these assignments can be considered and disposed of together. Before entering upon such consideration, for a better understanding of the principles of law involved, we deem it important to refer again briefly to the nature of the suit, and the condition of the record upon which these appeals are presented: The suit, as shown by the statement of the case preceding this opinion, was one in equity, brought by a judgment creditor of the Pony Gold Mining Company to recover from the defendants amounts unpaid upon the capital stock of that company, which are alleged to have been unpaid because of conveyances of property by the defendants to the company in consideration of the issue of a certain amount of fully paid capital stock, which property was of a value much less than the par value of such stock.

We have decided that the record does not disclose positively, or even inferentially, that it contains all of the evidence introduced at the hearing, and that therefore the appellants cannot attack the finding of the court on the ground of the insufficiency of the evidence. These findings are therefore conclusive upon

appellants. They are full and complete. Presumably, they were based upon competent evidence; and, the record not being shown to contain all the evidence, the further presumption is to be indulged that there was sufficient competent evidence given at the trial to support the findings.

It is the well-settled law that in an equity case the mere admission of incompetent evidence will not be sufficient to warrant a reversal, because of the presumption that the court below only considered competent evidence in making up its findings. (*Merchants' Nat'l Bank v. Greenwood*, 16 Mont. 395, 41 Pac. 250; *Forrest v. Forrest*, 25 N. Y. 501-510; *Sawyer v. Campbell*, 130 Ill. 186, 22 N. E. 458; *Gardner v. Gardner*, 23 Nev. 207, 45 Pac. 139; *McDonald v. Jacobs*, 85 Ala. 64, 4 South. 605; *Salt Lake F. & M. Co. v. Mammoth Min. Co.*, 6 Utah, 351, 23 Pac. 760; *Monroe v. Reid*, 46 Neb. 316, 64 N. W. 983; *King v. Murphy*, 49 Neb. 670, 68 N. W. 1029.) There is the following exception to this rule: Where it clearly appears from the record that the court actually considered the incompetent evidence in making up its findings, or where the record, containing all the evidence, does not disclose sufficient competent evidence to warrant the findings. It is not clearly apparent, however, in this case, that the court considered incompetent evidence; and, as we have already held the record not purporting to contain all the evidence, we cannot presume that there was not competent evidence before the court sufficient to sustain the findings. So that it appears that the exception above stated does not apply in this case.

Again, one of the most important allegations of the complaint was to the effect that the board of trustees of the Pony Gold Mining Company, of which the appellants were members, by resolution duly adopted, purchased certain property of appellants and one Samuel T. Hauser, and agreed, in consideration therefor, to issue to appellants and Hauser 499,991 shares of the full-paid capital stock of the company, and to give to said defendants the company's three notes, of \$50,000 each, secured by mortgage from the company, on all the property so pur-

chased and conveyed. After the plaintiff had introduced the record of this meeting over defendants' objections, appellants amended their answer, alleging "that, while the books of by-laws and the minutes of the Pony Gold Mining Company show the issuance of 499,991 shares of stock of the Pony Gold Mining Company for the consideration of certain property mentioned in the complaint, the fact is as follows: That the said defendants Elling and Morris were the owners of all the property mentioned in the complaint; that, by a contract with their codefendant S. T. Hauser and the Pony Gold Mining Company, the said Hauser and the said Pony Gold Mining Company agreed to pay to these defendants for their property the following, to-wit: They were to cause the construction of a railroad from Sappington, in the county of Gallatin, to the mines and property of these defendants, above the town of Pony, and the said Pony Gold Mining Company was to erect, equip, and furnish, complete, a four hundred ton concentrator for the treatment of ores of the mines conveyed by these defendants to said company. That these defendants were to be paid two hundred thousand dollars—fifty thousand dollars in cash, and one hundred and fifty thousand dollars in deferred payments, by the note of the said Pony Gold Mining Company, secured by a mortgage on all the property of said company. In addition thereto these defendants were to receive 133,333 shares of the capital stock of said company. That the above and foregoing was the consideration, and the only consideration, received by these defendants, or either of them, for or on account of the property conveyed to S. T. Hauser and to the Pony Gold Mining Company by these defendants." By this proceeding of appellants, they asserted the existence of the very proof which they had objected to, and therefore clearly waived their objection to its introduction. Having relied upon the records of the company themselves in one regard, they could not be heard to say that the very same records were not properly identified and admissible. Under the principles above announced, this court

will not enter into the consideration of the question of the admissibility of the evidence complained of.

There were also various errors assigned to the rulings of the court upon the cross-examination of witnesses, but we do not perceive how any injury to appellants could have been occasioned by any of such rulings. Besides, there is no showing in the record what the answers would have been to the questions which were excluded. Neither do the questions give any indication of the specific evidence sought to be adduced. This court will not reverse a case upon such uncertain ground.

As to the statute of limitations:

We shall consider all the errors assigned upon this question together, because all are directed to the same end, and therefore will be disposed of by the same decision.

In order to decide this question, we must fully understand the nature of the liability sought to be avoided. One of the fundamental questions applicable to the consideration of all statutes of limitation is, when did the cause of action arise, and, therefore, when did the statute begin to run? If, under the statute imposing the liability, a suit might have been instituted against the stockholders immediately and directly, then such statute would at once have commenced to run. If, however, under the statute, it was necessary that suit be instituted and concluded against the corporation, and execution returned unsatisfied, before there could be said to be a liability against the stockholder, then the cause of action against the stockholder would not arise until that time, and the statute would only then begin to run. In other words, was the liability of the stockholder direct and primary, or secondary?

This court, in *Kelly v. Clark*, 21 Mont. 291, 53 Pac. 959, 42 L. R. A. 621, 69 Am. St. Rep. 668, says, "The shareholders are only secondarily liable," etc.

The liability of the stockholder in this case is based upon the provisions of Section 457 of the Fifth Division of the Compiled Statutes of 1887, which is as follows: "The stockholders of every company incorporated under the provisions of this

article [chapter] shall be severally and individually liable to the creditors of the company in which they are stockholders, to the amount of unpaid stock held by them respectively, for all acts of and contracts made by such company, until the whole amount of capital stock subscribed for shall have been paid in." Section 458, Fifth Division, Compiled Statutes, provides: "The trustees of such company may purchase mines, manufactories and other property necessary for their business, and issue stock to the amount of the value thereof in payment thereof, and the stock so issued shall be declared and taken to be full stock, and not liable to any further call; neither shall the holders thereof be liable for any further payments under the provisions of Section 457 of this chapter; but in all statements and reports of the company to be published, this stock shall not be stated or reported as being issued for cash paid into the company, but shall be reported, in this respect, according to the facts."

Plaintiffs claim that the trustees issued stock as full paid to the appellants on the purchase of property from them, very much in excess of "the amount of the value thereof," and that under the decision of this court in *Kelly v. Clark*, 21 Mont. 291, 53 Pac. 959, 42 L. R. A. 621, 69 Am. St. Rep. 668, there was unpaid upon said stock the difference between the actual value of the property and the par value of the stock. The theory of the enforcement of this statutory liability is that this unpaid balance on the stock is an asset of the corporation, and a trust fund for the benefit of its creditors. The bill filed is in the nature of a creditors' bill to reach and apply a portion of this equitable trust fund to the indebtedness. The indebtedness was against the corporation, and not against the stockholders. By this statute they are "liable to the creditors of the company in which they are stockholders to the amount of unpaid stock held by them respectively, for all acts of and contracts made by such company." Under the statute the enforcement of this unpaid balance is to be accomplished by the same means as would be used in case the stockholders had subscribed for the

capital stock of the company, and a portion of such subscription yet remained unpaid.

In the fourth edition of his excellent work on Corporations, at Section 200, Mr. Cook discusses this question as follows: "Although it may be considered settled law, at least in the United States, that unpaid subscriptions to the capital stock of corporations constitute a trust fund for the benefit of corporate creditors, yet such unpaid balances of subscription are not the primary or regular fund for the payment of corporate debts. Persons transacting business with a corporation look to the corporation itself for the payment of their debts. Credit is given to the corporation, not to the stockholders; and it is the natural order of business that the creditors of the corporation are to be paid by the corporation from funds in the corporate treasury. Ordinarily corporate creditors have no knowledge or concern about the subscription list, and unpaid or partially paid subscriptions are a matter entirely between the corporation and the subscribers. So long as the corporation meets its obligations in the ordinary course of business, corporate creditors have no need to concern themselves about unpaid subscriptions of stock. But when the corporation is in default and embarrassed, or for any reason fails to pay its debts, then its creditors have rights with reference to such unpaid subscriptions. They then have the right to know whether all the subscriptions for stock have been fully paid in, and, if not, they have the right to compel such payment. It accordingly becomes important to know at what point, in their efforts to collect what is due them, corporate creditors may cease to pursue the corporation, and proceed directly against its delinquent members. The well-established rule upon this point is that a corporate creditor's suit to enforce payment of unpaid subscriptions can be properly brought only after a judgment at law has been obtained against the corporation, and an execution returned unsatisfied. * * * By this is meant that judgment shall have been duly recovered against the corporation, and execution issued and

regularly returned unsatisfied. Nothing short of that exhausts the remedy against the corporation."

Of course, if the corporation has been declared a bankrupt, or is utterly insolvent, or has been dissolved, no proceedings need be taken against such company, because the law does not contemplate useless acts.

It is apparent, therefore, that the cause of action against appellants did not arise until after the execution against the company was returned unsatisfied, and that the rulings of the court upon the question of the statute of limitations were correct.

We are therefore of the opinion that the judgment and order appealed from should be affirmed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment and order denying motion for new trial, appealed from, are affirmed.

MACK, APPELLANT, v. HILL, RESPONDENT.

(No. 1,529.)

(Submitted April 9, 1903. Decided April 27, 1903.)

Warranty Deed—Equitable Mortgage—Equitable Relief.

1. A grantor cannot maintain a suit in equity for the sole purpose of having a deed absolute on its face declared a mortgage, but must also offer to redeem the property, and place himself wholly within the jurisdiction of the court to settle the whole controversy between him and his grantee.
2. He who seeks equity must do equity.

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

ACTION by Wilhelm D. Mack against Fred L. Hill to have a warranty deed declared to be a mortgage. A demurrer to the complaint was sustained, and plaintiff appeals. Affirmed.

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139	303

Mr. Howard S. Greene, and Mr. James Donovan, for Appellant.

The demurrer is on two grounds, the first only of any materiality, as the second is the conjunctive and must be overruled. (*White v. Allatt*, 87 Cal. 245; *Greenbaum v. Taylor*, 102 Cal. 624.)

The right of redemption can only be lost by foreclosure and sale. The court ought to have overruled the demurrer and decreed a foreclosure and sale to satisfy the debt, or held that the deed was only a security. (*Watts v. Keller*, 56 Fed. 1; *Book v. Beasley*, 40 S. W. 101; *Buckman v. Alwood*, 71 Ill. 155; *Biglow v. Ayrant*, 46 Barb. (N. Y.), 143; *May, Fraudulent Con.*, Sec. 51.)

Defeasance may be parol. (*Jackson v. Lodge*, 36 Cal. 28.)

To sustain the demurrer allows a fraud. A court of equity will interfere to prevent such acts. (*Story, Eq. Juris.*, Sec. 439; *Parmlee v. Lawrence*, 44 Ill. 405, 410.)

The deed as a conveyance is void. (*Peugh v. Davis*, 96 U. S. 332; *Kerr's Sup. Wilt. Mtg. Forcl.*, Secs. 889, 896, 897.)

Mr. Thomas E. Brady, for Respondent.

MR. COMMISSIONER CALLOWAY prepared the opinion for the court.

In his complaint, plaintiff, appellant here, alleges that "at all times hereinafter mentioned the plaintiff was, ever since has been, and now is" the owner of certain land in Cascade county, Montana, describing it. That on June 13, 1897, he executed and delivered to the defendant his certain promissory note in the sum of \$1,000, due in one year, and at the same time executed and delivered to defendant a mortgage deed on said land to secure the payment of the note. That on August 25, 1899, he executed and delivered to the defendant "his certain warranty deed, covering the said described land, upon the following contemporaneous agreement, to-wit: That said deed

was not to convey the title to said grantee, but that any time within one year thereafter the said grantor, the plaintiff herein, had the right to pay the sum due on the aforesaid mentioned note, together with interest thereon, and that the defendant, upon the payment to him of said sum, would cancel said deed and deliver as paid to the said plaintiff the said note; that the said plaintiff herein had full authority to sell and dispose of said lands, using the money derived therefrom to take up and pay the said note, which the said defendant herein retained and held, and now does retain and hold; that the said conveyance, although absolute on its face, was intended, executed, and received under said agreement as a mortgage or security for the payment of said debt." That on August 26, 1899, the defendant placed the deed of record. "That the said defendant, at the time of making the agreement above mentioned, promised the said plaintiff that he would in no manner undertake to dispose of said property without the consent of said plaintiff, but, notwithstanding said agreement, the said defendant is now threatening and has threatened plaintiff on the 20th day of October, 1899, that, unless said sum of money mentioned in said note is paid within forty-eight hours thereafter, that the said defendant would sell and dispose of said land, which threat plaintiff believes defendant intends to carry out. Wherefore plaintiff prays a decree of this court adjudging and declaring the said deed above mentioned to be a mortgage, and further decreeing that the title to said land, although standing in the name of defendant, is in the plaintiff herein."

To this complaint the defendant, respondent herein, demurred, alleging that it does not state facts sufficient to constitute a cause of action.

Other grounds of demurrer are assigned, but as they are not properly alleged, and are not necessary to this decision, we shall not pass upon them.

The court below sustained the demurrer, and, the plaintiff refusing to plead further, judgment was entered for the defendant for costs, from which the plaintiff appeals.

The question then is, does the complaint state facts sufficient to constitute a cause of action?

It will be observed that this is not an action to have a deed absolute on its face declared to be a mortgage, and to have the equitable mortgagor's right of redemption enforced, including the reconveyance of the property by the equitable mortgagee. Under the facts stated in the complaint, the court is unable to enforce the contract alleged to exist between the parties. Nor does the appellant ask it. On the contrary, it appears that the appellant, having entered into an unwise contract, asks the court to interpret it in his favor only. He does not allege that he will in any wise be injured if respondent carries out his threat to sell the property in question; for aught that appears in the complaint, appellant's indebtedness to respondent may be greatly in excess of the value of the property. And it may be inquired, in passing, how the defendant is to "cancel" the deed, which is of record. Probably the plaintiff may desire a reconveyance of the property, but he does not say so. Nor does the appellant even intimate that he ever expects to pay the indebtedness which the deed was given to secure. He does not allege a tender of the sum due respondent, nor does he assert his willingness to pay it when the year mentioned shall expire. He also fails to state any facts which show that he has not a full and complete remedy at law for the respondent's anticipated malconduct, for, so far as the court is advised, respondent is solvent, and fully able to respond in damages for the breach of his contract with the appellant.

Appellant commences his brief with the statement that "this action is brought to declare a deed, absolute on its face, a mortgage." In *Cowing v. Rogers*, 34 Cal. 648, the court said: "No precedent is cited of an action instituted for the sole purpose of having an absolute deed declared a mortgage." This language is quoted with approval in *Cline v. Robbins*, 112 Cal. 581, 44 Pac. 1023. We have searched the books diligently, but in vain, for such a case, and quite agree with the suggestion of the supreme court of California.

The fact of declaring this deed a mortgage, and stopping there, might compel the respondent to bring an action to foreclose it. Courts will not try lawsuits by piecemeal. They incline to the maxim, "It is for the public good that there be an end to litigation."

In *Coung v. Rogers, supra*, it is said: "If the position of the plaintiff is correct that, notwithstanding this action and a judgment in his favor declaring the deed to have been intended as a mortgage it is necessary for the grantee to foreclose the mortgage in order to realize the money intended to be secured, then the present suit was essentially idle and useless." And again: "It is very clear that when he does sue, offering to redeem and praying that the premises may be reconveyed to him, the court is authorized, if the facts warrant it, to declare that the deed, absolute in its terms, was intended as a mortgage, and to prescribe the terms of redemption and reconveyance. Such judgment is as binding upon the grantor in respect to the redemption as upon the grantee in respect to the character of the instrument and the reconveyance. It is one of the incidents of a mortgage that, where the mortgagor seeks the aid of a court of equity in effecting a redemption, the court may prescribe the terms of the redemption."

If the appellant desires the court to declare that, in equity, the transaction between himself and respondent constitutes a mortgage, he must offer to redeem. He cannot fail to perform his part of the contract and demand that equity be done. He must place himself wholly within the jurisdiction of the court to settle the entire controversy. See *Hughes v. Davis*, 40 Cal. 117.

In commenting on the maxim, "He who seeks equity must do equity," Mr. Pomeroy observes: "It says, in effect, that the court will give the plaintiff the relief to which he is entitled, only upon condition that he has given, or consents to give, the defendant such corresponding rights as *he* also may be entitled to in respect of the subject-matter of the suit." (1 Pom-

eroy's Equity Jurisprudence, Sec. 385.) This the plaintiff has not done or offered to do.

In our opinion, the judgment should be affirmed.

PER CURIAM.—For the reasons stated in the foregoing opinion the judgment appealed from is affirmed.

STATE EX REL. HICKLIN, RELATOR, v. WEBSTER,
RESPONDENT.

(No. 1,859.)

(Submitted April 2, 1903. Decided April 27, 1903.)

*Public Lands—Unsurveyed Portion of Townsite—Conveyance
—Judges—Jurisdiction.*

Under Act of Congress, March 2, 1867, as amended by Act, July 1, 1870, and Compiled Statutes of Montana, 1871-2, page 546, *et seq.*, a district judge has no jurisdiction to issue a deed for an unsurveyed portion of a townsite to a person not claiming to be an occupant of the land at the time the townsite was entered, before such portion had been surveyed, platted, and necessary streets, etc., laid out as required by Section 5117 of the Political Code.

Mandamus by the state, on relation of E. B. Hicklin, against F. C. Webster, judge of the Fourth judicial district, and ex officio probate judge of Missoula county, and trustee of Missoula townsite. Peremptory writ denied.

Messrs. Duncan & Draffen, and *Messrs. Nolan & Loeb*, for Relator.

Messrs. Marshall & Stiff; and *Mr. Frank Woody*, for Respondent.

MR. COMMISSIONER POORMAN prepared the opinion for the court.

This is an application for a writ of mandate to the judge of the Fourth judicial district of Montana, ex officio probate judge of Missoula county, and trustee of the townsite of Missoula, commanding him to execute and deliver to relator a deed to a certain piece of land, 50 by 105 feet in dimensions, situate within the limits of such townsite as originally entered. An alternative writ was issued, and the respondent, the judge of said district court, has shown cause by answer. The relator had previously made application to respondent for a deed to said piece of land, which application had been denied. At the hearing in the district court the First National Bank of Missoula filed a protest against the issuance of a deed to relator, controverting the material allegations of relator's application, and claiming the land as its own, but made no demand for a deed. School District No. 1 of Missoula county also filed with respondent a petition requesting that the piece of land in question be surveyed, platted, and offered for sale at public auction for the benefit of such school district.

It appears from the record that the townsite was entered under the Act of Congress approved March 2, 1867 (14 Stat. 541), as amended by Act approved July 1, 1870 (16 Stat. 183), providing, in substance, "that when any portion of the public domain was settled upon and occupied as a townsite it might be lawful * * * for the judge of the county court for the county in which such townsite was situated, to enter the land * * * in trust for the several use and benefit of the occupants thereof * * * the execution of which trust as to the disposal of the lots in such town, and the proceeds of the sale thereof to be conducted under such regulations as may be prescribed by the legislative authority of the state or territory in which the same might be situated."

This townsite was surveyed and the official plat thereof was filed in the office of the county clerk of Missoula county on the

5th day of April, 1871. It further appears that the particular piece of land for which conveyance is sought is a portion of a larger piece or strip of land included within this townsite, which strip has never been surveyed, numbered, or platted, except as it is included within the exterior boundaries of said townsite, and has never been laid off into lots and blocks; that the necessary roads, streets, lanes, and alleys, if any are necessary through the same, have not been laid out or dedicated to the public use; and that the only description of the land for which a conveyance is sought, which respondent had or was able to obtain, was that furnished by relator from a private survey which relator had caused to be made of that particular part of said strip of land for which he demanded a deed. A jurisdictional question is thus presented, as to whether the respondent, as such trustee, at the hearing before him, had jurisdiction in the premises further than to ascertain whether antecedent acts had been complied with.

The Acts of Congress leave it entirely to the state and territorial legislatures where the land is situate to prescribe the mode of procedure to be observed in dealing with land within townsite entries, and, if the laws of the state of Montana in force with respect thereto at the time the application was made for this deed required this land to be "surveyed into suitable blocks and lots," the respondent, as such trustee, upon ascertaining that this had not been done, could go no further. (Section 2391 Rev. St. U. S. (U. S. Comp. St. 1901, p. 1459); *Edwards v. Tracy*, 2 Mont. 49; *Hershfield v. Rocky Mt. B. T. Co.*, 12 Mont. 102, 29 Pac. 883; *Ming v. Foote*, 9 Mont. 221, 23 Pac. 515; *County of Amador v. Gilbert*, 133 Cal. 53, 65 Pac. 130.)

The territorial law in force at the time this townsite was entered made specific provision that a survey and plat should be made, and that the townsite should be surveyed "into blocks, lots, streets and alleys," and that no lot should exceed in area 4,200 square feet. Further specific provisions were made as to the manner of disposing of lots, both claimed and unclaimed;

but no provision whatever was made, prescribing a method of dealing with any part of a townsite not "surveyed into blocks and lots." (Comp. St. 1871-72, p. 546 *et seq.*) It was evidently the intent of the territorial law that all the land included within a townsite entry should be "surveyed into blocks, lots, streets and alleys" in the first instance, and no further survey was provided for. The law so far gives the trustee authority to dispose of only that part of a townsite which had been surveyed into blocks and lots. What, then, shall be done with the unsurveyed portion?

In this connection we find an able opinion cited in respondent's brief, written by Mr. Justice Belford, of the supreme court of Colorado, and cited in the case of *Martin v. Hoff* (Ariz.), 64 Pac. 448, where the court uses this language: "Some land would be found in each subdivision not actually built upon or otherwise occupied for town purposes. What, then, is to be done with this land not occupied or improved? To whom is it to go? Clearly, not to the general government, for its title has ceased by the issuing of the patent; not to the territory, for it never had any interest; not to the trustee, for he is a mere conduit or channel through which the title passed from the government to the *cestui que* trust; not to the individual citizen, for the Act of Congress defines the extent of his individual interest. The trust is manifestly a double one—the first a trust for the occupants of the town as individuals; the other a trust for them collectively as a community * * * * This whole matter is left to the local legislature. To it belongs the creation of the tribunal before whom individual rights shall be adjudicated. It prescribes the kind of evidence necessary to make good a claim of title. It prescribes what kind of disposition shall be made of the money arising from the sale of lots, and in fact has full and plenary power over the whole subject-matter of the trust. And to strengthen this power conferred by congress, the law declares that any act done by the trustee, inconsistent with or in violation of the rules and regulations prescribed by the legislature for the execution

of the trust, shall be void and of none effect. Congress seems to have contented itself with declaring simply who might enter the land, and denominating the *cestui que* trust; all else it hands over to the territorial legislature, which is better fitted, on account of its proximity to the subject-matter of the trust, to supervise and direct its details. * * *. By an oversight the legislature made no provision for the disposition of portions of this land to which no individual claim existed, and there is nothing in either Act of Congress from which a power of sale in the trustee can be inferred, and much to repel such an inference. The Acts of Congress leave it altogether to the territorial legislature to determine what disposition shall be made within the objects of the trust of town lots belonging to the community at large, and of the proceeds of such of them as may be sold. This part of the trust most clearly cannot be executed without the intervention of local legislation. The trustee cannot sell under the Acts of Congress, because they do not authorize him to sell any portion of the trust property, or to make any disposition whatever of moneys that might come into his possession on such sale. It being evident that it was the intention of congress that the lands included within the townsite, and to which no rightful claim exists on the part of any individual, should be sold, and the proceeds disposed of under the directions prescribed by the legislature, who are to establish rules and regulations for the whole execution of the trust; and, it being further evident that the legislature failed to provide for the disposition of the same, it is clear to us that any sale of such land made by the probate judge or trustee, in the absence of these rules and regulations, was wholly unwarranted and absolutely void * * *. It was entirely competent for him to make conveyances to those having a valid and rightful claim to land at the date of the entry, provided they furnished the proper and requisite proof,—beyond this his acts were *ultra vires*, and could in no manner affect the rights of the community.” (*City of Denver v. Kent*, 1 Colo. 336.)

In 1895 the legislature of the state of Montana enacted Sec-

tion 5117 of the present Political Code. Prior to that time there was no authority given the trustee by legislative enactment for disposing of unsurveyed portions of a townsite, and he can only dispose of such land now in the manner authorized by this section. The land must first be surveyed into lots and blocks. All necessary roads, streets, and alleys must be laid through the same, and dedicated to the public use. The relator does not claim to have been an occupant of this land at the time of the entry of this townsite, and does not claim to have occupied the same prior to the 21st day of April, 1902. He is not, therefore, a prior claimant under the law in force at the time of the entry of this townsite, or at the present time, as that law and the rights of occupants thereunder is considered and interpreted in the case of *City of Helena v. Albertose*, 8 Mont. 499, 20 Pac. 817, and the land which the relator claims, if required therefor, may be taken for a street or alley; and there is nothing in this record to show that the land claimed by relator, or at least a portion of it, will not be within a necessary street or alley when the survey is finally made. The trustee of a townsite has no authority to issue a deed conveying any part of a street. (*Hershfield v. Rocky Mt. B. T. Co.*, 12 Mont. 102, 29 Pac. 883; *Parchen v. Ashby*, 5 Mont. 69, 1 Pac. 204.)

It is claimed by counsel for relator, in the very able brief filed, that there "is no provision of law anywhere, or in force at any time, authorizing a subsequent survey and plat to be made." Counsel, perhaps, have reference to the law in force at the time this townsite was entered, for it cannot be contended that Section 5117 of the present Political Code does not give this authority; and whether the plat filed as a result of this subsequent survey is called a new plat, or the completion of the old one, is immaterial. It must be done before the trustee has jurisdiction to grant title to this land, or any part of it.

Counsel for relator further contend that "the law presumes that everything was done that was required should be done by the predecessors of the respondent trustee with reference to the entry of the townsite of Missoula, and with reference to the

acts required to be done by his predecessors under the law, immediately following the entry of said townsite."

In the case of *Ming v. Foote*, *supra*, this court quotes with approved the following language from the opinion of Mr. Justice Field in *Smelting Company v. Kemp*, 104 U. S. 640, 26 L. Ed. 875: "So, also, according to the doctrine in the cases cited, if the patent be issued without authority, it may be collaterally impeached in a court of law. This exception is subject to the qualification that when the authority depends upon the existence of particular facts, or upon the performance of certain antecedent acts, and it is the duty of the land department to ascertain whether the facts exist and the acts have been performed, its determination is as conclusive of the existence of the authority against any collateral attack as is its determination upon any other matter properly submitted to its decision." The court then adds, as a part of the opinion in *Ming v. Foote*: "The authority of the probate judge did depend upon the existence of certain facts. It was his duty to ascertain whether these facts existed. His determination is evidenced by his deed, and the same is conclusive against collateral attack."

The respondent trustee made inquiry as to whether these antecedent acts had been performed, and, finding no record or other evidence that the acts required by law had been complied with, very properly decided that he had no authority to issue a deed to relator.

The view here taken renders it unnecessary to discuss the other questions raised by respondent in this case.

We are of the opinion that the application for a peremptory writ of mandate should be denied.

PER CURIAM.—For the reasons given in the foregoing opinion, the alternative writ of mandate heretofore issued in this cause is quashed, and the peremptory writ prayed for denied.

BUTTE HARDWARE COMPANY, APPELLANT, v. KNOX,
RESPONDENT.

28	111
31	121
28	111
137	535

(No. 1,518.)

(Submitted April 14, 1903. Decided April 27, 1903.)

*Pleading—Counterclaim — Fraud—False Representations—
Judgment on the Pleadings.*

1. Fraud is never presumed, nor can it be proved unless the ultimate facts constituting it be specifically alleged, and where no such facts are alleged, inferences and innuendoes are wholly insufficient as a pleading.
2. In an action on a note, defendant alleged by way of counterclaim that she had purchased a boiler of plaintiff, which was to be of a certain heating capacity, and that on testing the boiler it was found to be insufficient and otherwise defective. The only allegation that the seller made any representations as to the boiler, or that the buyer relied upon any such statements in making the purchase, was that the buyer was deceived by false representations that the boiler was a first-class boiler and sufficient, but there was no direct allegation that any such statements were made or relied on by the purchaser. It was alleged that the note in suit was given to settle the balance of an account, but there was no statement that this account represented the balance due on the boiler. Held not to state facts constituting a defense or counterclaim.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

ACTION by the Butte Hardware Company against Jessie C. Knox. From a judgment for defendant, plaintiff appeals. Reversed.

Mr. Bernard Noon, and Mr. F. T. McBride, for Appellant.

In order to render it actual fraud in any case, the following essential elements should be present: First. The misrepresentation must be of a matter of fact, and not of law. Second. It must be of a fact as distinguished from a mere expression of opinion. Third. It must be of a fact at the time or previously existing, and not a mere promise for the future. Fourth. It must be of a material matter. Fifth. It must be relied upon

by the person to whom it is made or whose action it is intended to influence. (Vol. 8, First Ed., Am. & Eng. Ency. of Law, p. 636.)

Representations of the value and utility of machines and the like are mere matters of opinion. (Vol. 8, First Ed., Am. & Eng. Ency. of Law, p. 636; *Neidefer v. Chastlain*, 71 Ind. 363, 36 Am. Rep. 198.)

If the representation is as to a matter not equally open to both parties, it may be said to be a statement of a fact; but if it is as to a matter that rests entirely in the judgment of the person making it, and the means of information upon which a fair judgment can be predicated are equally open to both parties, and there is no artifice or fraud used to prevent the person to be affected thereby from making an examination and forming a judgment for himself, the representation is a mere expression of opinion and does not support an action for fraud. (Vol. 8, First Ed., Am. & Eng. Ency. of Law, p. 636; 2 Addison on Torts, p. 422, Sec. 1186.)

Nor will misrepresentation be a defense to the contract where the party learns of the facts in time to back out, yet chooses to complete or affirm the contract. (*Whiting v. Hill*, 23 Mich. 399; *Pratt v. Philbrook*, 41 Me. 132; *Verroll v. Verroll*, 63 N. Y. 45; *Bridge v. Penniman*, 105 N. Y. 62.)

The law presumes that men are honest in their dealings, and it is therefore well settled as a general rule that unless there is some special relation involving trust or confidence, or other exceptional circumstances, fraud is never to be presumed but must be clearly proved by the party alleging the same. (Vol. 14, 2d Ed. Am. & Eng. Ency. of Law, p. 190, and cases cited in note 3.)

Equity aids the vigilant, not the slothful. This maxim has been termed a "special form of the yet more general principle, he who seeks equity must do equity." But in the form above stated it has a particular importance, because for a long time it supplied in equity the place of the statute limitations at law. Very early in their history the courts of chancery began to re-

quire of suitors before them promptness as a condition of relief. Indeed, the application of this maxim is defended for the same reasons and upon the same grounds as the statute of limitations. (Vol. 11, 2d Ed. Am. & Eng. Ency. of Law, p. 165; *Pratt v. Cal. Min. Co.*, 24 Fed. 876; *Aikens v. Hill*, 7 Ga. 573; *Wolf v. Great Falls Water Power, etc. Co.*, 15 Mont. 49.)

General demurrer raises question of laches. (1 Beach, Modern Eq. Pr. Sec. 258, p. 291, and cases cited in note 2.)

An action for relief on the ground of fraud or mistake (the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting fraud or mistake), shall be commenced within two years. (Subd. 4, Sec. 524, Code Civ. Proc.; Sec. 5165, Pol. Code; Subd. 4, Sec. 42, First Division Compiled Statutes of Montana.)

Mr. John N. Kirk, Mr. L. J. Hamilton, and Messrs. Sinclair & Dygert, for Respondent.

Where there is an issue raised by the pleadings, it is error to render judgment thereon. (*Bach, Cory & Co. v. Mont. L. & P. Co.*, 15 Mont. 346, 39 Pac. 291; *Floyd v. Johnson*, 17 Mont. 471, 43 Pac. 631.)

Unless all the material issues in the case can be virtually settled by the pleadings, a judgment on the pleadings should not be rendered. (*Leopold v. Silverman*, 7 Mont. 287, 16 Pac. 580.)

Answering appellant's argument on its motion to instruct the jury for judgment on the evidence and to make findings of fact as requested by it, we submit the following as the law applicable to the evidence on trial: Secs. 2291, 2292, Civil Code; Ency. of Law, Vol. 14, pp. 34, 35, and cases cited.

Where there is any doubt as to whether a statement was intended and understood as a mere expression of opinion, or a statement of fact, the question must be passed upon by a jury.

(Ency. of Law, Vol. 14, p. 35; *Muse v. Shaw*, 124 Mass. 59; *Teague v. Irwin*, 127 Mass. 217; *Foster v. Kennedy*, 38 Ala. 359, 81 Am. Dec. 56.)

A representation that a house is "as good as new," whereas, in fact, it was an old building in part and had been repaired by the vendors, and some of the timbers and boards used in it were rotten, was the false representation of a fact and entitled the purchaser to rescind. (*Eibel v. Von Fell*, 55 N. J. Eq. 670.)

As a general rule, if statements are made positively as of his own knowledge by one who is apparently in a position to know the truth and are relied upon by the person to whom they are made, they are not to be treated as mere matters of opinion. (Ency. of Law, Vol. 14, p. 44; *Henderson v. Henshad*, 54 Fed. 420; *Green v. Farmer*, 80 Fed. 41; *Clifford v. Conill*, 29 Cal. 589; *Todd v. Pigott*, 114 Ill. 648; *Shind v. Pierce*, 6 Allen, 413 (Mass.); *Haven v. Neil*, 43 Minn. 315; *Cressler v. Rees*, 27 Neb. 515; *Messer v. Smyth*, 59 N. H. 41; *Van Epps v. Harrison* (N. Y.), 5 Hill, 63.)

Representations in regard to the qualities and characteristics of an article made by the seller who may be presumed to speak from actual knowledge are not statements of mere opinion. (*Darby v. Stuart*, 63 Vt. 570.)

A false statement by the seller of an article "that it is well made and will stand up to concert pitch," may authorize the buyer to rescind and is not mere opinion. (*Shind v. Pierce* (Mass.), 6 Allen, 413.)

The seller is liable in an action for deceit for false representations as to soundness, where the representation was that, "that it was sound," or "was sound as far as he knew," where the seller knew at the time that it was unsound. (*West v. Emery*, 17 Vt. 583, 44 Am. Dec. 356.)

A statement by the seller that "they are as thrifty and healthy a lot as he has ever owned, and that he has been in the business for a good many years," is a material representation of a fact and not a mere matter of opinion, and if false, and known to

him to be false, will authorize a verdict for fraud and deceit. (*Stevens v. Bradley*, 89 Iowa, 174; *Lewis v. Jewell*, 151 Mass. 345, 21 Am. St. Rep. 454; *Baker v. Faucet*, 69 Ill. App. 300; *Perkins v. Rice*, 12 Am. Dec. 298; *Coon v. Atwell*, 46 N. H. 510; *Martin v. Jordan*, 60 Me. 531; *Hill v. Wilson*, 88 Cal. 92; *Mason v. Roplie*, 66 Barb. 180.)

It is sufficient for the plaintiff to offer in the pleading to return to the seller what he has used, and, if their rights can be adjusted by the judgment, the rule that one who seeks to rescind a contract on the ground of fraud must place the other party in as good a situation as he was in before the contract is satisfied. (*Smith v. Houlett*, 51 N. Y. S. 910.)

Where a purchaser has no knowledge that statements of fact of a vendor are false, he may rely on them implicitly if they are not so openly and palpably false that their untruth is apparent to an ordinarily prudent person. (*City of Tacoma v. Tacoma Light & Water Co.*, 50 Pac. 55.)

A statement that an article is "sound as a dollar," and the purchaser relying on such statement makes the purchase, the seller is liable for all damage necessarily sustained by the buyer by reason of breach of such warranty. (*Schee v. Shore*, 50 Pac. 903.)

It is not essential that misrepresentation, whereby one obtains an advantage over another, should be intentionally false. (*McCready v. Phillips*, 76 N. W. 885; *Morre v. Hinsdale*, 77 Mo. App. 217.)

False representations of a seller of personal property, made to bring about a sale of the property, is ground for rescission of the sale whether or not the seller knew them to be false, as he is bound to know that representations made by him are true. (*Beetle v. Anderson*, 73 N. W. 560; *Schofield G. & P. Co. v. Schofield*, 40 Atl. 1046.)

Whether a representation "good as gold" is a matter of opinion or a statement of fact on which the vendee was entitled to rely is a question for the jury. (*Andrews v. Jackson (Mass.)*, 47 N. E. 412.)

To entitle the buyer to recover for misrepresentations by the seller, he need not have relied solely on the representations, but it is sufficient if the representations had a material influence in inducing the purchase. (*Handy v. Waldeon*, 35 Atl. 884.)

MR. COMMISSIONER POORMAN prepared the opinion for the court.

This action was brought for the purpose of obtaining judgment against defendant for the amount alleged to be due on a promissory note executed by defendant and payable to plaintiff, and for the foreclosure of a certain real estate mortgage given by defendant to secure the payment of said note. The complaint is in the usual form, and sets out a copy of the note and mortgage.

The defendant filed an answer, in which she admitted the allegations of the complaint, but, as a plea in avoidance, alleged certain facts relating to the execution of said note and mortgage. The answer is here given in full in so far as it is necessary to refer to the same in determining the questions raised with respect thereto by the errors assigned:

"(1) At the time of the execution of the said promissory note and mortgage sued upon in this action, and for a long time prior and subsequent thereto, the defendant was engaged in the business of conducting a greenhouse in the city of Butte, state of Montana; that defendant had in her employ a man by the name of J. H. Mitchell; that said Mitchell contracted with J. M. Montgomery & Co., who were conducting a boiler works in the city of Butte, for a 40-horse power boiler to be used in the heating of the greenhouses run by defendant; that the said boiler was to have sufficient capacity to heat all the greenhouses defendant then had standing, and, in addition thereto, to heat at least as many more greenhouses when they were erected, and said boiler was to furnish the heat at a moderate cost for fuel; that said boiler was to be first class in every respect, and the price thereof, set up, was to be \$785."

Paragraph 2 alleges, on information and belief, that the firm of J. M. Montgomery & Co. was composed of J. M. Montgomery and the plaintiff.

Paragraph 3 alleges that J. M. Montgomery & Co. placed a certain five-flue steamboat boiler in the greenhouse of defendant; that the same was entirely unfit for the purpose for which it was contracted.

Paragraph 4 alleges that the defendant gave the boiler a thorough test, and found that the same consumed an enormous amount of fuel, and was not fit for the purpose of heating the greenhouse; that some of her plants froze, and she was damaged to the extent of \$1,500.

Paragraph 5 alleges that the boiler never was a first-class boiler, nor intended to be used for heating purposes; that the defendant was obliged to remove the same from her greenhouse, and to replace it with a 54-flue boiler.

"(6) That defendant was deceived and misled in the purchase of the boiler by the said J. M. Montgomery & Co., in their false representations that the said boiler was a first-class boiler, and would do the heating of said greenhouse, and other greenhouses to be erected by defendant, at a moderate cost for fuel."

"(7) That defendant paid on account of said boiler the sum of \$285."

"(8) That the said note and mortgage sued upon in this action was given to secure the balance of an account due the said J. M. Montgomery & Co., which account defendant alleges, upon information and belief, has, previous to the execution of the note and mortgage sued upon in this action, been assigned to the plaintiff herein; and defendant further alleges that she has already paid more than said boiler was worth, and that she never received any consideration for the note and mortgage which she executed to this plaintiff, and which is sued upon in this action; that the same was executed and delivered through a misapprehension of her rights in the premises; and that she is now ready and willing to turn over to the said J. M. Mont-

gomery & Co., or to the plaintiff herein, the said boiler, and tenders the same to either of them."

The answer then concludes with a prayer that the note and mortgage described in plaintiff's complaint be canceled by decree of court.

The plaintiff moved for judgment on the pleadings on the ground "that the answer of defendant does not state facts sufficient to constitute a defense to plaintiff's complaint." This motion was by the court overruled. Plaintiff then filed a replication. At the trial the defendant claimed the right, and was allowed, to open and close the case. Plaintiff thereupon objected to the introduction of any testimony on the part of defendant, for the reason "that defendant's answer does not state facts sufficient to constitute a defense or counterclaim to the cause of action set out in plaintiff's complaint." This objection was by the court overruled. Judgment was rendered for defendant. From this judgment the plaintiff appeals, and assigns the action of the court in overruling the motion for judgment on the pleadings, and in overruling plaintiff's objection to the introduction of any testimony on the part of defendant, as errors Nos. 1 and 2 in its brief filed. These errors properly present for determination the sufficiency of the answer as a defense to the action, and will be considered together.

It is a well-recognized principle of pleading that, where it is sought to set aside or avoid a contract on the ground of false representations or of fraud, the ultimate facts constituting such representations or fraud must be specifically alleged, that the court may be advised as to whether the matters pleaded will, if proved, be sufficient to warrant the relief demanded. Men are presumed to act fairly and to deal fairly with each other in their business transactions, and fraud is never presumed, nor can it be proven unless alleged. Mere expressions of opinion or of judgment do not, except in particular cases, which must be shown by the pleading, constitute actionable fraud or false representations. Statements made by the owner of property as to the superior kind, quality or character of his possessions

do not of themselves constitute actionable fraud or false representations, though such statements may not accord with the truth. Where a contract is attacked on the ground that it was procured through false representations or fraud, the opposing party is entitled to know from direct and consistent allegations of the pleading that he is called upon to defend against such charges.

The foregoing principles are supported in whole or in part by the following cases: *Territory v. Underwood*, 8 Mont. 133, 19 Pac. 398; *York v. Steward*, 21 Mont. 518, 55 Pac. 29, 43 L. R. A. 125; *State ex rel. Crawford v. M. & M. L. & I. Co.*, 20 Mont. 203, 50 Pac. 420; *Budd v. T. C. Power & Co.*, 8 Mont. 384, 20 Pac. 820; *Bickle v. Irvine*, 9 Mont. 253, 23 Pac. 244, and cases cited; *First Nat'l Bank v. Boyce*, 15 Mont. 173, 38 Pac. 829; *State ex rel. N. W. Nat'l Bank v. Dickerman*, 16 Mont. 288, 40 Pac. 698; Ency. Pleading & Practice, Vol. 8, p. 906; *Cheney v. Powell*, 88 Ga. 629, 15 S. E. 750; *Burden v. Burden*, 141 Ind. 471, 40 N. E. 1067; *Cade v. Head Camp W. O. W.*, 27 Wash. 218, 67 Pac. 603; *Grentner v. Fehrenschield*, 64 Kansas, 764, 68 Pac. 619.

The case of *Stetson v. Riggs*, reported in 37 Neb. 797, 56 N. W. 628, was an action for the foreclosure of a mortgage on certain real estate, in which the defendant filed an answer alleging that a part of the consideration for the note and mortgage sued upon was the purchase price of certain real estate which the defendant had purchased from the plaintiff; that the plaintiff had represented that the real estate was in a certain locality, and showed the same to the defendant, but that in the conveyance the plaintiff described a certain other piece of land, which had not been shown to defendant as such purchaser, and which he had never agreed to purchase; that the piece of land actually conveyed was worth \$500 less than that which was shown to defendant by the plaintiff, and which he had contracted for. The plaintiff at the trial objected to the introduction of any evidence, for the reason that the answer did not state facts sufficient to constitute a defense. The supreme court, in passing

upon the case, uses this language: "The defense of Riggs was in effect an action against Stetson for damages for false representations made by the latter. This answer, then, to be good, must allege with reasonable certainty: (a) That Stetson made some representation to Riggs, meaning he should act on it; (b) that the representation made was false; (c) that Riggs believed such representation to be true, relied and acted upon it, and was thereby damaged. (*Byard v. Holmes*, 34 N. J. Law, 296, and cases there cited.) * * * *Runge v. Brown*, 23 Neb. 817 [37 N. W. 660]." The court then holds the answer insufficient as not constituting a cause of action against Stetson, and reversed the judgment of the lower court.

"It is incumbent upon the party claiming to recover in an action for deceit founded upon false representations to show that he was influenced by them * * * to his damage." (*Taylor v. Guest*, 58 N. Y. 262.)

"To sustain a judgment for damages for fraud and deceit in the sale of a newspaper, upon the ground that its subscription list was not as large as represented, it must be alleged, and also shown, that the purchaser relied on the representation of the number of paying subscribers as an inducement to the purchase." (*White v. Smith*, 39 Kan. 752, 18 Pac. 931.)

"It is also necessary for the plaintiff in such an action [damage for false representation] to prove that he believed and relied upon the false representation in order to entitle him to recover." (*Humphrey v. Merriam*, 32 Minn. 197, 20 N. W. 138.)

"It should be averred that the false statements were believed to be true by the plaintiffs, and, thus believing, were relied upon by them, and that they induced the action taken by the plaintiffs which resulted in damage to them." (*Pforzheimer v. Selkirk*, 71 Mich. 600, 40 N. W. 12; *Parker v. Armstrong*, 55 Mich. 176, 20 N. W. 892.)

"False representations or fraud will not avoid a sale unless it appears that the seller was thereby induced to do that which

he would probably not have done except for such fraud or deception." (*Klopenstein v. Mulcahy*, 4 Nev. 296.)

Innuendo cannot perform the office of direct statement, nor inference suffice for positive allegation.

From the foregoing authorities it is apparent that if this answer is sufficient it must appear therefrom with reasonable certainty: (1) That certain representations which defendant had a right to rely upon were made by or at the instance of the vendor; (2) that they were false; (3) that defendant believed such representations to be true, and did rely upon them, and was induced thereby to enter into the contract; (4) that defendant suffered damages thereby; (5) that the note sued upon represents the purchase price, or a part of it, for the boiler described in the answer.

From an examination of this answer it is found that paragraph 1 thereof contains the allegation that this boiler was purchased from J. M. Montgomery & Co. by the agent of the defendant; that it was to possess certain qualities, and to accomplish certain purposes. Further on, in paragraph 2, we find the statement that it was entirely unfit for the purposes for which it was contracted; and this statement is repeated in different forms in paragraphs 4 and 5.

It will be further found that nowhere, except in paragraph 6 of the answer, is there any allegation, or even an intimation, that the vendor ever made any representations or statements whatsoever with reference to this boiler; nor is there any statement or intimation that the defendant ever relied upon any statements made by the vendor, or that she was induced to make the purchase by reason of any representations. The whole of paragraph 6 is in the nature of an inference to be drawn from some other part of the pleading, and no other part of the pleading justifies such an inference. It is more properly an innuendo, without any previous direct statement to base it upon. And, as we have seen heretofore, fraud is not to be inferred nor presumed, unless the facts, properly stated, justify such an infer-

ence or presumption; and, where no such facts are alleged, inferences and innuendoes are wholly insufficient as a pleading.

Paragraph 8 of the answer contains the allegation that the note and mortgage sued upon were given to secure the balance of an account due said J. M. Montgomery & Co.; but there is no statement, direct or indirect, that this account represented the balance due on this boiler account. For aught the pleadings show, this account may have been for other commodities or articles of merchandise. It is true it is alleged in this paragraph that defendant never received any consideration for the note, but this is based upon the theory that the note is void because of false representations made, and these representations are not sufficiently pleaded to constitute a defense or counterclaim to this action.

It may be urged that the answer filed by the defendant is in the nature of a counterclaim, and not a defense, and that plaintiff's motion for judgment on the pleadings is not sufficient for the reason that he does not use the term "counterclaim" therein. Whatever there may be in this contention, it is not necessary to discuss or to decide here, for we are considering this assignment of error in connection with the second assignment, which raises practically the same question, and in which second assignment the term "counterclaim" is used.

The action of the trial court in overruling plaintiff's objection to the introduction of any testimony on the part of defendant was, for the reason heretofore stated, erroneous, and the judgment rendered by the district court in said cause should be reversed.

We therefore recommend that the judgment heretofore entered in this cause by the trial court be reversed, and the cause remanded.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment is reversed, and the cause remanded.

STATE EX REL. STROMBERG-MULLINS CO., RELATOR,
v. DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT ET AL., RESPONDENTS.

28	123
28	445
28	123
30	35

(No. 1,932.)

(Submitted April 13, 1903. Decided May 4, 1903.)

New Trial—Statutory Provisions—Noncompliance — Effect—Statement — Settlement—Loss of Right—Revivor—Amendments—Acceptance—Notice—Mandamus.

1. Since a motion for a new trial is a statutory remedy, in order to successfully invoke it, the mode pointed out by the statute must be pursued.
2. Under Code of Civil Procedure, Section 1173, Subdivision 3, providing that, where amendments to a statement of the case for a new trial are not adopted, the proposed statements and amendments shall be presented to the judge by the movant within ten days, on five days' notice to the adverse party, or delivered to the clerk for the judge, where movant notified his adversary that the statement would be presented to the judge for settlement at a certain time, and at the time appointed failed to appear, and did not present the statement to the judge or leave it with the clerk, or then and there adopt the amendments of the adverse party, it lost its right to have the statement settled at all.
3. The right could not be revived by a subsequent adoption of the adverse party's amendments.
4. A motion filed with the clerk for the settlement of a statement on motion for new trial, reciting the acceptance of the adverse party's amendments to the statement, but not called to such adverse party's attention, is not notice to him of such acceptance.
5. Under the provisions of the Code of Civil Procedure, it is the duty of the judge to settle statements and bills of exceptions, and for this purpose they must be presented to him, and not to the court as such. *Quære*: Whether in a proceeding for a writ of *mandamus* to compel a district judge to settle a statement it is proper practice to make the court a party to the proceeding?

ORIGINAL application for writ of *mandamus* by the state, on the relation of the Stromberg-Mullins Company, against the Second Judicial District Court in and for the county of Silver Bow, and William Clancy, a judge thereof. On motion to quash. Motion granted.

Messrs. Kirk & Clinton, for Relator.

Mr. J. E. Healy, for Respondents.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Original application for a writ of *mandamus* to compel William Clancy, as judge of the Second judicial district court, to settle a statement on motion for a new trial. On application to this court an alternative writ was issued, directing the defendant judge to settle the statement or show cause why he had not done so. He appeared by motion to quash the writ, and also by answer. After argument, the question of law arising upon the record was submitted.

There is no material controversy as to the facts. So far as they are necessary to be stated, they are the following: The cause of *Harrington v. Stromberg-Mullins Company*, a corporation, was tried in the district court of Silver Bow county on December 8, 1902, the defendant judge presiding. The plaintiff had verdict, and a judgment was rendered thereon. On December 10th the relator, through its counsel, served and filed its notice of intention to move for a new trial, and on the same day obtained an order granting it 'thirty days' additional time in which to prepare and serve its statement. The statement was served on counsel for the plaintiff in the case on January 17, 1903. Counsel proposed various amendments to the statement on January 20th. On January 21st he was served with notice that certain of the amendments had been adopted, but that others of them had not, and that the statement would be presented to the defendant judge for settlement on January 27th, at 10 o'clock a. m., at the courtroom where the judge held court. At the appointed hour counsel for the plaintiff appeared. Counsel for the defendant (relator) did not appear, nor did they on that day leave with the clerk of the court or with the judge the statement, with the amendments. Sometime in the afternoon of that day, however, one of counsel for the relator took the statement, without the amendments, to one of the clerk's deputies, and, after having him indorse upon it the date of its reception, took it away again. It was retained by counsel until the

morning of January 31st, when it was again brought to the office of the clerk, but without the amendments, either in a separate paper or incorporated in the statement as a part of it. On January 31st, upon motion of counsel for relator, the statement was set for hearing on February 7th, the plaintiff's attorney orally objecting to the setting of the hearing, or any consideration of the matter of settlement, on the ground that it was presented out of time. On February 3d, counsel for relator filed with the clerk a motion, in which they recited that they accepted all of the amendments proposed by opposing counsel, and asked that the statement be settled and ordered filed. No order was then made or entered by the court or judge upon this motion. On February 7th the hearing was continued until February 14th. On this latter date plaintiff's counsel filed his written objection to the settlement, setting forth as a ground thereof, among others, that the proposed statement, with the amendments, had not been presented to the judge for settlement, nor left with the clerk for the judge, under the requirements of the statute, and, therefore, that relator had lost its right to have the same settled. The matter of settlement was continued thereafter from time to time until March 21st, when, after a hearing, the judge made an order sustaining the plaintiff's objection, and declined to settle the statement.

The question presented, therefore, is: Did the relator, by its failure to present the statement, with the amendments, in accordance with the statute, or, in lieu thereof, by its failure to leave them with the clerk for the judge, lose its right to have the statement engrossed and settled? It is argued by counsel that, notwithstanding they had first elected to pursue the course indicated by their notice to secure the settlement, and the situation in which they found themselves on February 3d, they nevertheless had the right at that time to adopt the amendments theretofore rejected, and insist that the judge should settle the statement. In this we think counsel are in error. A motion for a new trial is a statutory remedy, and, in order to successfully invoke it, the mode pointed out by the statute must be pursued.

(*Ogle v. Potter*, 24 Mont. 501, 62 Pac. 920.) If the purpose is to make the motion upon a statement of the case, the statement must be prepared and settled under the provisions of Section 1155 and Subdivisions 2 and 3 of Section 1173 of the Code of Civil Procedure. Under these provisions, if no amendments are proposed by the adverse party, the statement may be presented to the judge for settlement within a reasonable time; if amendments are proposed and adopted, the statement may be engrossed and presented for settlement within a like reasonable time. In neither case is notice to the adverse party necessary. If the amendments are not adopted, either of two courses may be pursued by the moving party: The statement and amendments may be presented to the judge within ten days after the amendments are proposed, upon five days' notice to the adverse party, or they may be delivered to the clerk for the judge. If they are presented to the judge at the time appointed, he may proceed at once to a settlement, or he may appoint another time for that purpose. If they are delivered to the clerk, he must at once deliver them to the judge when the judge is in the county; if the judge is absent from the county, the clerk must, upon notice in writing by any of the parties, forward them to the judge, otherwise the clerk must deliver them to the judge immediately upon his return. Thereupon it becomes the duty of the judge to fix a time for the settlement, and to cause the parties to be notified by the clerk. At the time so fixed, or at a time to which a postponement may be had, the judge must make the settlement. The judge is not authorized nor required to settle a statement not presented in substantial conformity with these requirements. The moving party is entitled to have his motion heard and disposed of upon the basis upon which he makes it (*Sweeney v. Great Falls & Canada Ry. Co.*, 11 Mont. 34, 27 Pac. 347), yet he cannot insist that the court shall settle the statement upon which he intends to predicate the motion, unless he has observed the requirements of the statute or such observance has been waived by the adverse party. In this instance the relator notified the adverse party that it would present the

statement to the judge at a specified time and place. Though the adverse party appeared at that time and place, the relator did not. Its counsel did not then present the statement, with the amendments, to the judge, nor did they then or thereafter leave the statement and amendments with the clerk for the judge. If the judge was absent (and it does not appear from the record in this cause whether he was or not), the statement should have been left with the clerk for him. One or the other course should have been pursued. As the relator pursued neither, and did not notify the adverse party then and there that it would accept the amendments, it lost its right to have the statement settled at all. So far as the record shows, it never gave the adverse party notice that the amendments had been adopted, but left counsel to find out this fact from the written motion filed with the clerk. Under the circumstances, no obligation rested upon the defendant judge to settle the statement. Nor could the relator thereafter revive this right by adopting the amendments and then asking that the statement as amended be settled. But, conceding that it might have preserved its right, and, by adopting, accepted the amendments, and notifying counsel of the adverse party that it had done so, it failed to give this notice. A mere motion filed with the clerk, but not called to the attention of the adverse party, is not notice to such adverse party, unless the statute so provides. We know of no provision of the statute authorizing the notice to be given in this way.

We note that the court is made a party to this proceeding. Under the statute, it is the duty of the judge to settle statements and bills of exception, and for this purpose they must be presented to him, and not to the court as such. No point is made by counsel on either side as to whether this is proper practice. We therefore pass it without comment.

The alternative writ is quashed and set aside, and the proceeding is dismissed.

Dismissed.

Rehearing denied May 18, 1903.

ROBERTSON ET AL., APPELLANTS, v. LONGLEY ET AL.,
RESPONDENTS.

(No. 1,564.)

(Submitted May 2, 1903. Decided May 4, 1903.)

*Appeal—Sufficiency of Evidence—Review—Bill of Exceptions
—Specification of Particulars—Complete Record.*

1. Under Code of Civil Procedure, Section 1152, providing that, when an exception to a verdict or decision is on account of the insufficiency of the evidence, the objection must specify the particulars in which the evidence is alleged to be insufficient, a bill of exceptions containing no specifications whatever, nor pointing out in any manner any insufficiency, will not warrant a review of the evidence.
2. Where it is not apparent from any recital in the record that it contains all the evidence, or the substance thereof, and there is no statement in the certificate of the judge from which it may be inferred that the bill contains all the evidence in substance, its sufficiency cannot be reviewed.

Appeal from District Court, Park County; Frank Henry, Judge.

ACTION by Frank C. Robertson and others against T. W. Longley and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

Mr. T. J. Porter, and Mr. A. P. Stark, for Appellants.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought by the plaintiffs, as stockholders of the Enterprise Mining & Smelting Company, a corporation, to obtain a decree declaring the defendants trustees of the title to the New Enterprise and Blue Mountain quartz lode mining claims for the benefit of the corporation, and requiring them to make conveyances of the property to it. From a judgment in favor of the defendants, plaintiffs have appealed.

There was no motion for a new trial in the court below, and the only question argued in the brief of appellants is the insufficiency of the evidence to sustain the findings. Upon examination of the transcript, we find that we cannot consider this question for two reasons:

1. Section 1152 of the Code of Civil Procedure provides that, "when the exception is to the verdict or decision, upon the ground of the insufficiency of the evidence to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient." The bill of exceptions found in the record contains no specifications whatever, nor any attempt in any manner to point out any alleged insufficiency of the evidence. It must, therefore, be disregarded.

2. It is not apparent from any recital in the record that it contains all the evidence, or the substance thereof, heard by the court below at the trial; nor is there any statement in the certificate of the judge from which the inference is permissible that the bill contains all the evidence in substance. The record, therefore, does not present the question which appellants desire to have reviewed. (*State v. Sheppard*, 23 Mont. 323, 58 Pac. 868; *T. C. Power & Bro. v. Stocking et al.*, 26 Mont. 478, 68 Pac. 857; *King v. Pony Gold Mining Co. et al.*, 28 Mont. 74, 72 Pac. 309.) The judgment is therefore affirmed.

Affirmed.

LISKER, APPELLANT, v. O'ROURKE, RESPONDENT.

(No. 1,554.)

(Submitted April 29, 1903. Decided May 4, 1903.)

Trial—Witnesses — Examination in Chief—Anticipating Defense—Responsiveness of Answer—Appeal—Record—Omission of Judgment—Dismissal.

1. It was not error to exclude evidence of plaintiff in chief, which, though relevant to the issue made by the answer, was not necessary to establish the case as alleged in the complaint.

2. It was not error to strike out a voluntary statement made by defendant, not responsive to the question asked him, and irrelevant to the issues in the case.
3. Under Code of Civil Procedure, Sections 1722, 1736, providing that an appeal may be taken from a final judgment entered in an action, and that appellant must furnish the court with a copy of the judgment roll, where the record does not show that any judgment has been entered in the case in the court below, an appeal from the judgment will be dismissed.
4. A minute entry directing judgment to be entered for defendant is not a judgment.
5. Under Code of Civil Procedure, Sections 1738, 1176, upon appeal from an order denying a new trial the record must contain a copy of the judgment roll.

Appeal from District Court, Silver Bow County; John Lindsay, Judge.

ACTION by A. A. Lisker against John O'Rourke. From a judgment for defendant and from an order denying a new trial, plaintiff appeals. Appeal from judgment dismissed; order affirmed.

Mr. E. B. Howell, and Mr. Charles E. Sackett, for Appellant.

Mr. John O. Bender, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought by the plaintiff, as surety, to obtain contribution from the defendant, his cosurety. The defendant had judgment. The plaintiff has appealed from the judgment and an order denying a new trial.

1. Upon the appeal from the order, the errors assigned are upon the rulings of the court in excluding certain evidence offered by the plaintiff, and in striking out a certain statement made by the defendant when testifying in his own behalf. The evidence offered and excluded was neither relevant to, nor did it tend in any way to establish, the cause of action alleged in the complaint. It related wholly to matters alleged in the answer by way of affirmative defense. The plaintiff cannot complain because he was not permitted to introduce in chief evidence

which, though relevant to the issue made by the answer, was not necessary to make out his case as alleged. The evidence was properly excluded. The evidence stricken out was a voluntary statement made by the defendant, not responsive to any question asked him, and wholly irrelevant to the issues in the case. This ruling was also correct.

2. We cannot consider any error assigned upon the appeal from the judgment, for the reason that the record does not show that any judgment has been entered in the case in the court below. To support an appeal, the judgment must not only be entered (Code of Civil Procedure, Sec. 1722, Session Laws of 1899, p. 146), but the record on appeal must contain a copy of it (Code of Civil Procedure, Sec. 1736). The record contains a copy of a minute entry directing judgment to be entered for the defendant. This order is not a judgment. (*Butte & Boston Con. Mining Co. v. Mont. Ore Pur. Co.*, 27 Mont. 152, 69 Pac. 714.) This appeal must therefore be dismissed. (*Brunell v. Logan*, 16 Mont. 307, 40 Pac. 597.)

The appeal from the judgment is dismissed; the order denying a new trial is affirmed.

ON MOTION FOR REHEARING.

(Submitted June 6, 1903. Decided June 8, 1903.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The plaintiff has submitted a motion for a rehearing herein, in which the point is made that this court was in error in holding in the original opinion that the evidence excluded was properly excluded because it was offered in chief, whereas it related wholly to matters alleged in the answer by way of an affirmative defense and should have been offered, if at all, by way of rebuttal. It is argued that under a stipulation filed by counsel at the opening of the trial, the burden was cast upon the plaintiff to avoid the effect of the affirmative matter so set up in the an-

swer, and this being so, and the evidence tending directly to show an estoppel upon the defendant, it was competent and should have been admitted. We do not think this position tenable. After an examination of the record under the assumption that the theory of the plaintiff as to the burden of proof is correct, we find that the evidence was not relevant to any issue in the case. There was therefore no error in the ruling. But even if there were, the plaintiff is in no position to take advantage of it.

Our attention is now called to the fact that the appeal from the order denying a new trial should also have been dismissed, for the reason that the record fails to show that judgment had been entered in the district court and, therefore, that there is no judgment roll in the record as filed in this court. This course should have been pursued by this court, for upon appeal from an order denying a new trial the record must contain, among other things, a copy of the judgment roll. (Sections 1738 and 1176, Code of Civil Procedure.) No question presented on the appeal from the order denying a new trial was properly before the court for consideration. The same result is reached, however, in the disposition of the case as made, and we shall not now reopen it in order to rectify this technical error in practice.

The motion for a rehearing is denied.

Denied.

MILLER, ET AL., RESPONDENTS, v. MATHESON ET AL.,
APPELLANTS.

(No. 1,562.)

(Submitted May 2, 1903. Decided May 4, 1903.)

*Appeal — Denial of Continuance—Record — Insufficiency—
Review.*

Where there was nothing in the record to show that any motion for a continuance was made, heard or determined by the court, or that the court

ever made an order continuing or refusing to continue the cause, an assignment that the court erred in overruling defendant's motion for a continuance could not be reviewed.

Appeal from District Court, Teton County; D. F. Smith, Judge.

ACTION by C. A. Miller and A. O. Longmuir, co-partners and doing business under the firm name of Miller & Longmuir, against L. D. Matheson and Isaac Morehouse, co-partners and doing business under the firm name of L. D. Matheson & Co. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

Mr. Charles O'Donnell, for Appellants.

Mr. J. G. Bair, and *Mr. H. S. Hepner*, for Respondents.

MR. JUSTICE MILBURN delivered the opinion of the court.

This is an action by the plaintiffs to recover from the defendants the sum of \$500. After issue had been joined and the case set for trial, the defendants (appellants herein) served and filed the affidavit of Isaac Morehouse, one of the defendants, it being an affidavit for continuance of the cause. The case was set to be tried on the 22d day of November, 1899, and came on for trial on the following day, on which day the court gave and caused to be entered judgment for the plaintiffs, from which judgment this appeal is taken.

The only error assigned by appellants is that the court "erred in overruling defendants' motion for a continuance of the trial of said cause on the grounds of said motion being based on the affidavit of Isaac Morehouse." There is not anything in the record to show that any motion for a continuance was made, heard, or determined by the court. It does not appear that the court ever made any order continuing or refusing to continue the said cause. Therefore the judgment must be affirmed.

Affirmed.

MERRILL, RESPONDENT, v. MILLER, APPELLANT.

(No. 1,489.)

(Submitted March 18, 1903. Decided May 4, 1903.)

*Pleading—Complaint—Allegation of Equity—Amendment—
Trial — Findings — Decree — Accounting — Appeal —
Correction of Error by Trial Court—Patents—Suit for Con-
veyance—Jurisdiction of State Court.*

1. A suit to obtain a conveyance of an alleged interest in an invention, to enjoin defendant from disposing of plaintiff's interest therein, and to compel defendant to account for sums received by him for a sale to a third party of an interest therein—the sole issue being whether defendant had sold an interest in the machine to plaintiff—was not a suit arising under the patent laws, and the state court had jurisdiction thereof.
2. A suit was brought to obtain a conveyance of an alleged interest in an invention, and to enjoin defendant from disposing thereof to a third party, based on an agreement to render mutual assistance in obtaining the patent. Plaintiff had procured loans of money in aid of the project, and negotiated a sale of an interest in the machine, the proceeds of which he and defendant agreed to use in taking the machine to the Klondike and operating it. Defendant had violated the agreement, and refused to assign plaintiff any interest in the machine, and threatened to sell the same to a third party, and converted the money procured by the sale negotiated by plaintiff to his own use. *Held*, it was not necessary for plaintiff to allege an offer to pay a proportionate part of the expense of applying for a patent in defendant's name.
3. Where a complaint praying an accounting contained no allegation that the parties were partners, and there was no evidence to that effect, or that there were any profits from the project undertaken by them—the implication from the complaint being that there were none—it was error to decree an accounting and judgment for plaintiff's interest in the profits.
4. An assignment that the court erred in a finding will not be considered on appeal, where the court amended its finding, and there was no assignment that the amended finding was erroneous.
5. It is not error for the trial court, at the time it heard and determined a motion for a new trial, on discovery that it had inadvertently and through obvious mistake made an error in favor of plaintiff in a conclusion of law, to amend the same with plaintiff's consent.
6. It was not error for the court to permit an amendment to the complaint, after denial of a motion for nonsuit on plaintiff's evidence and before judgment, where no hardship or surprise to defendant was shown, and where no change of the issue resulted.

Appeal from District Court, Lewis and Clarke County; S. H. McIntire, Judge.

ACTION by Frank Merrill against Louis E. Miller. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Modified.

Messrs. Clayberg & Gunn, for Appellant.

In view of the allegations of the complaint, the opening statement of the attorney for the plaintiff to the jury, and the evidence introduced, the proposition that the plaintiff and defendant were joint inventors cannot be disputed. (*Ecaubert v. Appleton*, 67 Fed. 917-922; *Seymour v. Osborne*, 11 Wall. 552; *Lamson v. Martin*, 35 N. E. 78; *Washburn v. Gould*, 3 Story, 122; *Cahoon v. Ring*, 1 Cliff. 612.)

As the defendant and the plaintiff are joint inventors, and it is alleged and proven that the defendant has made an application for a patent in his own name, any patent issued on such application would be absolutely void. (*Slemmer's Appeal*, 98 Am. Dec. 248; *Kennedy v. Hazelton*, 128 U. S. 667; *Walker on Patents* (3d Ed.), Sec. 50; U. S. Rev. Statutes, Sec. 4892.)

As the patent to be issued on such application will be void under the showing made by the plaintiff, the court will not declare the defendant a trustee for the plaintiff of an interest in such patent, or direct the defendant to convey such interest. (*Kennedy v. Hazelton*, 128 U. S. 667; *Slemmer's Appeal*, 98 Am. Dec. 248.)

As the complaint was based upon the theory that the plaintiff and defendant were joint inventors, it was necessary for the court, in order to grant the relief demanded, to determine the question of whether or not the plaintiff and the defendant were joint inventors. Under such circumstances, the court had no jurisdiction of the case, as the case was one arising under the patent laws of the United States over which the circuit courts of the United States are given exclusive jurisdiction. (*Slemmer's Appeal*, 98 Am. Dec. 248; U. S. Rev. Statutes, Sec. 711.)

The finding that the plaintiff is entitled to an accounting of the profits made by the defendant out of the machine and in-

vention, and to a judgment for an interest therein is unauthorized. It is admitted that the defendant was the owner of an interest in the machine, invention, and patent which may be issued therefor. Under these circumstances he cannot be called upon to account. (*Dewitt v. Elmira Mfg. Co.*, 66 N. Y. 459; *Vose v. Singer*, 4 Allen, 226.)

Where there is an error in a finding of fact or conclusion of law it can only be corrected after judgment by granting a new trial. (*Hawthurst v. Rathgeb* (Cal.), 51 Pac. 846; *Los Angeles Co. v. Lankershim* (Cal.), 35 Pac. 153; *Wunderlin v. Cadogan*, 75 Cal. 617; *Brady v. Burke*, 90 Cal. 1; *Smith v. Taylor*, 82 Cal. 533; *Pico v. Sepulveda*, 66 Cal. 336; *Bate v. Miller*, 63 Cal. 233; *Condee v. Barton*, 62 Cal. 1.)

The court erred in permitting the plaintiff to amend the complaint. (*Newell v. Meyendorff*, 9 Mont. 254; 1 Ency. of Pl. & Pr. Sec. 548, and cases cited.)

Mr. R. R. Purcell, and *Mr. T. J. Walsh*, for Respondent.

MR. JUSTICE MILBURN delivered the opinion of the court.

This is an appeal from the judgment, and from an order denying defendant's motion for a new trial. The complaint, before amendment, alleged that the plaintiff and the defendant on the 1st day of October, 1897, "agreed that they would assist each other in the development of an idea" for the construction of a machine to thaw frozen placer ground, and that, no such machine having been invented theretofore, they would apply for, and procure to be issued to them, letters patent from the United States for the invention, and that they should each own an undivided one-half interest in the machine and the patent; that, in accordance with the agreement, they forthwith proceeded to "develop the said idea" and construct a working model, and in so doing the plaintiff rendered valuable assistance, and procured parties to advance money to aid them; that about the 20th day of January, 1898, the model having been completed

by the joint efforts of the parties hereto, the defendant made application to the government for a patent; that his application for such patent was pending at the time of the commencement of the suit; that the invention was very valuable and new, and the principle involved novel; that the capacity of the machine and its usefulness had never been determined, and that it had no determined value; that it was difficult, if not quite impossible, to determine the actual value thereof; that the plaintiff procured certain parties to advance sums of money for the purposes aforesaid, and, the patent having been applied for, the parties being desirous of raising additional funds to pay those theretofore advanced and to take the machine to the Klondike country, the plaintiff, acting under his original agreement with the defendant, negotiated the sale of an undivided one-fourth interest in the invention and machine to one William Tamkin, who paid to the defendant \$500 for such interest; that it was agreed between the said Tamkin and the plaintiff that with part of the said \$500 a boiler should be purchased for the purpose of operating the machine, and that Tamkin should, if the machine proved a success, advance, if necessary, \$50,000 for the purpose of building similar machinery and operating the same; that the parties agreed upon the payment of the said \$500 that they should both go to the Klondike country and operate the machine jointly, and that the plaintiff and the defendant should use the balance of that sum for the purpose of taking themselves and the machinery to said country; that the defendant converted the \$500 to his own use, and, having taken the machinery to the city of Seattle, was at the time of the commencement of the suit about to take the same to the Klondike country; and that the defendant had refused, and always refused, to assign and transfer to the plaintiff any interest in the machine, invention, or patent which is to be issued, and denied that the plaintiff had any right or interest in the invention or machine. Plaintiff further averred that the defendant threatened to sell and dispose of the entire remaining three-fourths interest in the said machine, invention, and patent to be issued thereon. The

defendant answered before amendment of the complaint, and denied all the material allegations of the complaint, except that he admitted the application for the patent, and that the invention was new and the principle novel, and that he had received the sum of \$500, and used the same for his own benefit, but denied any wrongful conversion thereof. He further admitted that he refused to convey to the plaintiff any interest in the invention, machine, or patent, and declared that plaintiff never had any right, title, or interest in the machine, invention, or patent; denied that he was then threatening to sell the property, or any of it, but said that he had already done so before the commencement of the action.

Evidence having been introduced in support of the complaint, the defendant moved the court for an order of nonsuit, which was denied. The defendant excepted to this ruling, and stood upon his motion for a nonsuit; stating to the court that he did not desire to introduce any testimony, and consenting that the jury might be discharged. The plaintiff also consenting, the cause was tried by the court without a jury. Thereafter, but before the court made any findings or conclusions in the premises, the plaintiff moved to amend his complaint by inserting after the phrase, "development of an idea," the sentence, "which had been conceived by the defendant, who was a machinist;" and by modifying the sentence, "they would apply for and procure to be issued to them letters patent," so that it would read, "they would procure to be issued letters patent;" and by inserting after the word "defendant," in a certain paragraph, the sentence, "who was the sole inventor of the same," referring to the "model machine" alleged by plaintiff to have been "completed and constructed by the joint and united efforts of the parties hereto." These amendments were made by leave of court; the defendant duly excepting, and saving an exception to the order of the court granting such leave. The record does not show the ground of objection. Plaintiff prayed judgment that the defendant be enjoined from disposing of any interest in the machine, invention, or patent belonging to plaintiff; that

the court decree that the defendant held an undivided three-eighths interest in the machine and invention in trust for the plaintiff; that the plaintiff had such an interest in the machine, invention, and any patent which may be issued; that the defendant be required to execute a proper conveyance; that defendant be required to account to the plaintiff for all sums received from Tamkin; and that the plaintiff have judgment for such an amount of the moneys so received as might be just.

No amendment to the answer was made or suggested. After the amendments to the complaint were made, the court made findings of fact and conclusions of law, condensed by us as follows: That on or about the 1st of October, 1897, the parties agreed that they would assist each other in the development of an idea for the construction of said machine; that, the machine being constructed, they would procure letters patent to be issued, and that each should own an undivided one-half interest in the machine, invention and patent; that the said idea was conceived by the defendant, and, the agreement having been entered into, the parties proceeded to construct the model expressing the idea conceived by the defendant; that the defendant was a machinist, and the plaintiff was not, but that he aided the plaintiff (defendant) in the construction of said machine and in putting it into operation, and procured parties to advance money so that the work could be carried on, and in all respects carried out his agreement with the defendant; that "the defendant, being the sole inventor of the said machine, has made application to the government of the United States for a patent for the same, and that his application for patent was pending at the time of the commencement of this action;" that the defendant procured the sale of a one-fourth interest to one William Tamkin for the sum of \$500, which was paid to the defendant, it being agreed between the parties that "the said sum of \$500 should be used in constructing a boiler to operate the said machine, and the remainder used to transport the same and the said machine and the parties hereto to the Klondike country, where they should operate the said machine;" that the defendant converted the

said \$500 to his own use, and took the machine to Seattle, where he asserts he disposed of all or part of his interest in the same, and, being about to take the same to the Klondike country, and having made other arrangements, he returned to Tamkin the money obtained from him, and took from him a reconveyance of the interest formerly transferred to Tamkin. The court further found that the defendant denies that the plaintiff has any interest in the machine, invention, or patent; that the averments made by the defendant in his affirmative defense are untrue; that the plaintiff is the owner of an undivided *one-half* interest in the machine, and that the defendant holds any patent which may have been issued, and will hold any patent which may be issued, in trust for the plaintiff and himself, "each in equal parts;" that the plaintiff is entitled to a conveyance from the defendant for an undivided *one-half* interest in the invention, and in any patent which has or may be issued; that the plaintiff is entitled to an accounting from the defendant for all profits which may have been made out of said invention, and to a judgment for *one-half* of the same. Judgment was entered accordingly. A motion for new trial was duly made, and, upon a hearing thereof, was denied. At the time when the motion for a new trial was denied, the court, having discovered an error, apparently inadvertently made, in its findings and in the judgment, made the following order: "In this cause, the motion for new trial herein having been heretofore argued before, submitted to, and by court taken under advisement, court this day ordered that unless the plaintiff agree to the modification of the judgment as indicated in the opinion filed, motion for new trial would be granted. Whereupon counsel for plaintiff agreed that the judgment might be amended accordingly." The court had found that a one-fourth interest had been sold to one Tamkin by the parties to this suit, and afterwards bought from Tamkin by the defendant; and therefore the court, on reflection, concluded that it should have found that the plaintiff owned only a three-eighths, and not a one-half, interest in the invention, ma-

chine and patent, and was only entitled to three-eighths of all profits, and judgment for one-half of the said \$500.

The defendant declares in his brief that the court erred: (1) In denying defendant's motion for a new trial, for the reasons (a) the court erred in overruling the motion for nonsuit; (b) the court erred in finding that the defendant was the sole inventor; (c) the court erred in finding that the plaintiff is entitled to an accounting of profits made by the defendant out of the machine and invention, and to a judgment for a one-half interest therein; (d) the court erred in finding that the plaintiff is entitled to a conveyance of an undivided *one-half* interest in the machine, invention, and patent. (2) The court erred in making amended conclusions of law. And (3) the court erred in permitting the complaint to be amended.

As to assigned error 1a, we do not find that the court erred in denying the motion for nonsuit. In the brief, counsel base their assignment of error as to the denial of said motion upon several grounds: (1) That the plaintiff and defendant were alleged by plaintiff, and by him proven, to be joint inventors, and that therefore the patent, if issued to their client, would be void, he having applied in his own name for the issuance thereof; (2) that as the patent to be issued under such application would be, as defendant says, void, the court could not declare the defendant a trustee for the plaintiff of any interest therein; (3) that it was necessary for the court to determine whether or not the plaintiff and defendant were joint inventors, and that this question can only be determined in the United States courts, in that it would be a question arising under the patent laws of the United States; (4) that "he who seeks equity must do equity," and that plaintiff does not offer to pay his share of the expenses of procuring a patent.

The first and second of these points are sufficiently discussed *infra*.

We do not consider the point as to the jurisdiction of the court well taken. No question arises here under the United States patent laws. The sole question is whether or not defend-

ant sold an interest in the invention to plaintiff. If he did, such contract of sale would be valid between the parties without any written evidence thereof. One of the purposes of this suit is to get from the defendant a written conveyance of the alleged interest of the plaintiff. It is of no concern to the defendant whether the plaintiff records such conveyance in the proper federal office, or not, after he obtains it. There is no question of infringement of the patent or of any of the rights of the plaintiff by any one except by the defendant. The state court in this case is not called upon to enforce any of the patent-right laws.

As to the fourth point under this head, we need only say that under all the circumstances of the case, as pleaded, it does not seem to have been necessary for the plaintiff to have alleged an offer to pay a proportionate part of the expense of applying for a patent in the name of the defendant. This point does not appear among the grounds of the motion for nonsuit as made to the court, and is merely stated, and not argued, in the brief.

Appellant complains and says that "the court erred in finding that the defendant was the sole inventor." (1b, *supra*.) Without commenting on the rather anomalous position taken by the defendant in complaining of a finding that he was the sole inventor of a machine for which he alone, and in his own name, is applying for a patent, without any assignment from any one, we take up the question involved. Appellant says in his brief: "In view of the allegations of the complaint, the opening statement of the attorney for the plaintiff to the jury, and the evidence introduced, the proposition that the plaintiff and defendant were joint inventors cannot be disputed." In another part of his brief it is said: "In view of all the evidence, the plaintiff and defendant were joint inventors. There is no evidence to the contrary." The complaint, as amended, alleges that the defendant was the sole inventor, and this is not denied by the defendant in his pleading, nor was any attempt made to amend the answer by denying it. It is hardly probable that a person who has applied for a patent in his own name, without holding

any assignment from any one else, would care to swear in a pleading that he was not the sole inventor. We do not find anything in the evidence of the plaintiff or any of his witnesses showing or tending to show that he suggested any improvement, or in any wise advanced any ideas which found expression in the machine, or were included in the claims of the defendant in his application for patent. It is true that the plaintiff, in his testimony, states that he assisted the defendant in developing the idea, which was apparently that of the defendant. The discussion of this point, of course, involves a consideration of alleged error No. 3, which will be considered *infra*.

As to specification 1c, *supra*, we are of the opinion that the court erred in finding that the plaintiff is entitled to an accounting of profits, and to a judgment for any interest therein. We note, of course, that the assignment refers only to the one-half interest mentioned in the judgment and findings before the same were amended; but, as to this point, it may be considered as governing the whole question as to profits. It need only be said that we do not find any allegation in the complaint that the parties were partners, and, further, there is nothing in the complaint or in the evidence to show that there were any profits. On the other hand, the complaint implies that there were none. We do not think that there is sufficient stated in the complaint to warrant any decree ordering an accounting for profits.

The alleged error 1d, to-wit, that the court erred in finding that the plaintiff was entitled to a conveyance of an undivided *one-half* interest in the machine, invention, and patent, need not be considered, for the reason that the court amended its findings, and found that the plaintiff was entitled to a conveyance of a three-eighths interest, as alleged in the amended complaint. It is not assigned that the court erred in finding any interest other than one-half, except so far as the second assignment of error, to-wit, that the court erred in making amended conclusions of law, covers the point.

Did the court err in making amended conclusions of law, as

claimed in assignment No. 2? We think not. It appears from the record that, at the time the court heard and determined the motion for a new trial, it discovered that it had inadvertently, and through obvious mistake, found that the plaintiff was entitled to a one-half interest, instead of a three-eighths interest, in the property referred to. It had overlooked the fact that a two-eighths interest had been sold by the parties to Tamkin, leaving only a three-eighths interest in the plaintiff. The court immediately, at the time above referred to, declared its intention to grant a new trial unless the plaintiff would consent to the amendment, and, the plaintiff so consenting, the motion for a new trial was denied, and the amendment made to show the facts. We do not see any error in the action of the court. Appellant has not cited any authority supporting his contention that the court erred in this behalf. In *Wunderlin v. Cadogan*, 75 Cal. 617, 17 Pac. 713 (at page 618, 75 Cal., and page 714, 17 Pac.), cited by appellant, the court, it is true, in passing upon the case before it, said: "The remedy for erroneous findings of fact is by motion for new trial. And the relief to be given upon such motion is the awarding of a new trial, to be had in regular course. It is not proper for the court, upon a motion of that kind, to immediately render a contrary decision. These rules rest upon the theory that the modes in which a decision may be reviewed are prescribed by statute, and that the court has no power to substitute other modes in their place." But the court, proceeding, remarked further: "The rules, however, do not prevent the court from correcting mere misprisions and orders improvidently and unintentionally entered." In *Hawthurst v. Rathgeb*, 119 Cal. 531, 51 Pac. 846, 63 Am. St. Rep. 142, also cited by appellant, the supreme court, referring to the fact that the lower court had found that the defendant had not executed a certain power of attorney, and after judgment had found to the contrary, held that "after findings have been filed, and judgment entered thereon, there is but one method by which those findings can be competently changed or modified, except

perhaps, in respect of a mere clerical error or misprision." Misprision is the act of misprising; misapprehension; misconception; mistake. The complaint in this case states, in effect, that the plaintiff was legal owner with the defendant in the property, and, as we have stated above, the two parties sold and conveyed a two-eighths interest to one Tamkin. The evidence tends to show this sale to Tamkin, which is admitted in the answer, although, of course, the defendant denies that plaintiff had any title in the property, or that plaintiff procured such sale to be made. The error of the court in making the finding that the plaintiff was entitled to a one-half interest in the property certainly was made through a misapprehension and mistake, obvious on the face of the record then before the court, and known to all the parties present at the time on the hearing of the motion for a new trial. We are not aware of any holding by this court which would require the lower court to refuse to make the correction of so apparent an error, and to put the parties to the trouble and expense of a new trial, instead of correcting its conclusions of law, as was done. Further, it is well to note the fact that in the amended findings the court declared that the plaintiff was entitled to a less interest in the property than it had found to be his in the finding before it was amended.

Assigned error No. 3 is that the court erred in permitting the complaint to be amended. We have stated *supra* what amendments were made. Amendments to pleadings should always be allowed, in the discretion of the court and in the interest of justice, upon such terms as may be just, and this may be done even after verdict and judgment, to make the pleadings correspond with the proof. (*Montana Ore Purchasing Co. v. Boston & Montana Con. C. & S. Mining Co.*, 27 Mont. at page 316, 70 Pac. at page 1123, and cases cited.) In this case the amendments appear to have been made before judgment, after the motion for a nonsuit had been denied. It does not appear that any hardship was worked to the defendant, or that he was in any wise surprised by the action of the court in allowing the amendments. The one question in the case is whether the de-

defendant was at the time of the commencement of the action trustee for the plaintiff for a three-eighths interest in the invention and patent rights, and one-half interest in the said \$500, under an agreement between the parties. The amendment of which the defendant seriously complains was that by which the averment of the original complaint, to the effect that the parties agreed "that they would apply for and procure to be issued to them letters patent," was modified to read "that they would apply for and procure to be issued letters patent." The alleged agreement as to the ownership was not changed, in our opinion, by the alteration made. The alleged object was to get a patent for the use of the parties, and, if counsel had mistakenly put into the complaint an averment that "they" would apply for and procure to be issued to them letters patent, whereas the unlearned plaintiff had understood that the defendant was to procure the patent in his own name for the use of both, he assuming that the patent thus was to be issued to them—it not being unusual for persons engaged in business together to have all or part of the property of the concern in the name of one of the parties—the amendment would not be improper. Under the evidence and the pleadings, we do not see any material or radical change, working injury to the defendant, in this amendment, and we do not see that the issue was changed.

Our attention is not called to the fact that the court decreed that the plaintiff should recover \$250 of the defendant—said sum being one-half of the \$500, which, according to the alleged agreement, was to be used for a certain purpose by both parties—whereas the court seems to have considered the sum of \$500 to be a trust fund held by defendant for himself and plaintiff. No error of the court in this behalf having been assigned or treated by defendant in his brief, we do not express any opinion as to the decree so far as it refers to the said sum of \$250.

The decree of the court below is modified in accordance with the views expressed in this opinion as to the matter of profits, and, as thus modified, is affirmed.

Modified and affirmed.

TANEY, RESPONDENT, v. VOLLENWEIDER, APPELLANT.

(No. 1,561.)

(Submitted May 1, 1908. Decided May 4, 1908.)

Garnishment—Payment Into Court by Garnishee—Effect of Judgment—Justice of the Peace—Change of Venue—Statutory Provision—Costs.

1. Where a garnishee paid into court, in answer to garnishment served upon her, the full amount of her indebtedness to the defendant in the proceedings, the judgment recovered therein against him operated to fully discharge the garnishee's indebtedness.
2. Where defendant, on being granted a change of venue, refused to pay the accrued costs as provided by Code of Civil Procedure, Section 1484, it was the duty of the justice of the peace to proceed with the trial.

Appeal from District Court, Deer Lodge County; Welling Napton, Judge.

ACTION by P. S. Taney against Mary Vollenweider. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

Messrs. Duffy & Casey, for Appellant.

Under Section 900, Code of Civil Procedure, it was made the duty of this appellant to pay the money into the justice's court as soon as she was served with garnishee process; it was also, under Section 1682, Code of Civil Procedure, the duty of the justice of the peace to receive the money. The garnishee and appellant in this action should be protected from double liability. (Drake on Attachment, 6th Ed., Secs. 693, 699, 701, 706 and 710; *Marden v. Wheelock*, 1 Mont. 52; *Dole v. Boutwell*, 1 Allen, 286; *Barrow v. West*, 23 Pick. 270; *Foster v. Jones*, 15 Mass. 185; *Holmes v. Remsen*, 4 Johns. Ch. 46; *B. & O. Ry. Co. v. May*, 25 Ohio St. 347; *Johnson v. Carey*, 2 Cal. 34; *Sessions v. Stephens*, 46 Am. Dec. 339.)

Messrs. Walsh & James, for Respondent.

The justice of the peace acted without jurisdiction in entering judgment, and the same is absolutely void. (*State ex rel. Kenyon v. Laurandean*, 53 Pac. 536.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was commenced in the district court by the plaintiff to recover the sum of \$45 and to establish and foreclose a mechanic's lien upon certain property in Anaconda, Montana. The complaint is in the usual form. The denials in the answer raise no material issues. As an affirmative defense the defendant alleges that after she became indebted to this plaintiff, and before the commencement of this action, she was served with a writ of attachment and notice of garnishment in an action in the justice of the peace court of C. H. Williams, a justice of the peace of Anaconda township, wherein Frank Hall was plaintiff and this plaintiff, P. S. Taney, was defendant; that a judgment was recovered by Hall against Taney for \$45.50; that an execution was issued thereon, a copy of which, with notice of garnishment, was also served on this defendant; and that by reason of these facts, and the demand of the constable, she paid into that court the sum of \$45, being the whole of her indebtedness to this plaintiff. A reply was filed, which assumes to put in issue the allegations of this affirmative defense. Upon the trial the defendant admitted that the plaintiff had performed the work for her as alleged in his complaint. The plaintiff then offered in evidence the record of the county clerk's office showing the filing of his lien, and then rested. The defendant offered in evidence the records of the justice of the peace court showing the proceedings had in the case of Hall against Taney from the commencement of the action to the entry of judgment, all substantially as alleged in her answer. She also introduced in evidence the receipt for the money paid into court by her. No rebuttal testimony was offered whatever,

and upon this record the district court found in favor of the plaintiff, and entered a money judgment for \$45 and for costs, amounting to \$6, and for \$50 attorney's fees. No finding whatever was made with reference to the lien claimed by the plaintiff, and no provision is made in the judgment for the foreclosure of such lien. From this judgment, and an order denying defendant's motion for a new trial, she appeals.

If, at the conclusion of plaintiff's testimony, no further evidence had been offered, a *prima facie* case would have been made out in plaintiff's favor for the amount of his claim. However, the defendant offered in evidence record proof of the fact that she had paid into court, in answer to garnishment served upon her, \$45, the full amount of her indebtedness to plaintiff; that such notice of garnishment had been served upon her before the commencement of this present action; and that a judgment was recovered in the justice of the peace court against this plaintiff. No attempt was made to dispute these facts, and upon this showing we deem them proved. This defendant having paid into the justice of the peace court the full amount of her indebtedness to this plaintiff upon the garnishment served upon her, and a judgment having been obtained against this plaintiff in that court, that judgment operated to fully discharge the indebtedness from this defendant to the plaintiff herein, and she was, therefore, entitled to a judgment in her favor for costs. We do not understand how the district court can enter up a judgment, including attorney's fees, upon an open account for work and labor done and for material furnished, in the absence of any finding that plaintiff is entitled to a lien (assuming that, in the event a lien was established, an attorney's fee might be recovered as a part of the costs). It appears from the record of the justice of the peace court that after defendant, Taney, appeared in that action, he moved for a change of venue, which was granted upon the condition that he pay the accrued costs, as provided by Section 1484 of the Code of Civil Procedure. This he refused to do, and the justice proceeded to try the cause, and entered judgment against him. It is now urged here that

he did so without jurisdiction, and that the judgment was, therefore, void. This was doubtless the theory upon which the district court proceeded in this cause in finding for the plaintiff. It would be an anomalous position, indeed, for a party to assume to say that he moved for a change of venue, and refused to pay the fees required as a condition precedent to the justice's transmitting the papers to another court, and then insist that the court of primary jurisdiction could not act further in the premises. We do not understand that a party by his wrongful act can secure such an advantageous position. Upon the refusal of Taney to pay the accrued costs as required by law, it was the duty of the justice of the peace to proceed with the trial. However, we cannot say that the testimony introduced upon the trial of this cause was all that might be produced upon a new trial thereof. It is therefore ordered that the judgment and order appealed from be reversed, with directions to the district court to grant the defendant herein a new trial.

Reversed and remanded.

MELTON, RESPONDENT, v. MARTIN, ADMINISTRATOR,
APPELLANT.

(No. 1,551.)

(Submitted April 28, 1903. Decided May 4, 1903.)

*Executors and Administrators—Claims Against Estate—Time
for Presentment.*

Under the direct provisions of Code of Civil Procedure, Section 2603, all claims against the estate of a decedent must be presented within the time limited in the administrator's notice to creditors, or they are barred forever, except when it appears by the affidavit of the claimant, to the satisfaction of the court, that he had no notice, by reason of being out of the state.

Appeal from District Court, Gallatin County; F. K. Armstrong, Judge.

ACTION by John A. Melton against J. P. Martin, administrator of James Dartis. From a judgment for plaintiff, defendant appeals. Reversed.

Messrs. Pierce & Pierce, for Appellant.

Mr. John A. Luce, for Respondent.

MR. COMMISSIONER CLAYBERG prepared the opinion for the court.

This is an appeal from a judgment rendered against appellant, as administrator of the estate of James Dartis, deceased, upon a claim of respondent against said estate for moneys alleged to have been paid to Dartis in his lifetime under a mistake. It appears from the complaint that plaintiff presented his claim to the defendant administrator March 8, 1899. The answer alleges that the first publication of notice to creditors was on February 9, 1898; that the value of the estate exceeded \$10,000; and that plaintiff did not exhibit his claim "within ten months after the date of the first publication of said notice, nor was it made to appear at any time or at all, by the affidavit of claimant or at all, to the satisfaction of this court or the judge thereof, that the plaintiff had no notice of the time allowed by said notice for the presentation of claims against said estate by reason of being out of the state or otherwise." This allegation was not denied by the replication, and therefore stands admitted. The case was tried upon an agreed statement of facts and "facts admitted by the pleadings." The ten months allowed by law after the first publication of notice to creditors had elapsed long before the claim was presented. Under Section 2603, Code of Civil Procedure, all claims must be presented within the time limited in the notice or they are barred forever, except in cases when "it is made to appear by the affi-

davit of the claimant to the satisfaction of the court or judge that the claimant had no notice as provided in this Title, by reason of being out of the state." It is admitted, as above stated, that no proof was adduced which would bring this claim within the above recited exception. Plaintiff, however, attempted to excuse noncompliance with this statute on the ground that the money had been paid by mistake, and that he did not discover this mistake until after the ten months had expired. We are not satisfied from the pleadings and statement of facts that a mistake ever existed, and, if it did, that plaintiff should not have discovered its existence within the time limited in the notice by the exercise of reasonable diligence.

Counsel for respondent further seek to justify their action on the ground that deceased held the money paid as a trust fund, and therefore it was not necessary to present the claim to the estate; but the pleadings are barren of any such suggestion, or of the further necessary suggestion that the identical money could be traced into the hands of defendant. Besides, this is not an action in equity to enforce a trust, but a suit at law to recover money "had and received," and the claim should have been presented to the administrator of the estate within ten months after the first publication of notice to creditors.

We are therefore of the opinion that the judgment appealed from should be reversed and remanded, and the court below should be directed to set aside the judgment appealed from, and enter judgment for the defendant for costs.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment appealed from is hereby reversed, and the cause remanded to the court below, with directions to set aside the judgment appealed from, and to enter judgment for the defendant for his costs.

DAYTON, RESPONDENT, v. EWART, APPELLANT.

(No. 1,535.)

(Submitted April 11, 1903. Decided May 4, 1903.)

Exemptions—Earnings of Judgment Debtor—Gold Dust from Miner's Placer Claim.

Section 1222 (Subdivision 7), Code of Civil Procedure, exempts to a placer miner the gold dust taken from his claim by his own labor within thirty days next preceding a levy of execution or attachment, when he is a poor man whose family resides in the state and depends for support upon his personal labor in working his mine, and the debt is not for the common necessities of life.

Appeal from District Court, Ravalli County; F. Woody, Judge.

ACTION by L. H. Dayton against E. Ewart, as constable. Judgment for plaintiff, and defendant appeals. Affirmed.

Mr. C. B. Calkins, for Appellant.

The legislature intended Section 1222 (Subdivision 7) for the protection of those whose labor is all the capital they possess; those employed by others by the day, week, month or year, and those whose sole profit is what they get for their services. A man owning and operating a placer mine has other capital besides the labor he individually performs in working his claim; in such case, his mine, water ditch, tools and appliances constitute his capital whereby he derives his profit in the occupation which he follows. If a placer miner can claim exempt the gold dust which he washes from his mine for a period of thirty days, then one engaged in any occupation could invoke the protection of this statute, the farmer, merchant, professional man, banker and contractor. (*Shelly v. Smith*, 59 Iowa, 453; *Heebner v. Chave*, 5 Pa. St. 115; *Smith v. Brooke*, 49 Pa. St. 147.)

Mr. S. G. Murray, and Mr. L. J. Knapp, for Respondent.

MR. COMMISSIONER CALLAWAY prepared the opinion for the court.

Respondent commenced this action in the district court of Ravalli county, Montana, to recover of appellant the value of certain gold dust. Appellant joined issue by answer. The parties then submitted the case to the court upon an agreed statement of facts. From this statement it appears that respondent is, and has been for several years last past, a resident of this state, and the head of a family residing in this state; that he is a miner, having the possessory title to a placer claim, which he has been working with his own water ditch, flume, pipe, tools, and other appliances; that he is a poor man, and that he and his family depend for support upon what he can get from working this placer mine; that on June 30, 1899, in an action in which the firm of May Bros. were plaintiffs and respondent was defendant, the appellant, who was then a constable of Stevens township, in said county, by virtue of a writ of attachment issued in said action, levied upon and took into his custody gold dust of the value of \$63.20, the property of respondent, and which had been mined by him within thirty days next preceding the levy of the attachment. On July 5, 1899, judgment by default was entered for the plaintiffs, execution was issued thereon, and the gold dust sold thereunder. Said judgment was obtained upon a promissory note executed by appellant to May Bros. for cash loaned to him.

Prior to the time of obtaining said judgment, and after the gold dust had been levied upon, respondent filed with appellant his affidavit, claiming the gold dust as exempt from attachment or execution, as earnings for his personal services rendered within thirty days next preceding the levy of the attachment. Upon appellant's refusal to release the same, respondent on July 24, 1899, commenced this suit. Upon the statement of facts submitted, the court entered judgment for respondent, and from such judgment this appeal is prosecuted.

The question for decision by this court is whether, under the facts presented, the respondent can successfully claim the gold dust mentioned as exempt from attachment and execution.

We must look to Section 1222, Code of Civil Procedure, for its solution. Subdivision 7 of this section provides that there shall be exempt from execution "the earnings of the judgment debtor for his personal services rendered at any time within thirty days next preceding the levy of execution or attachment, when it appears by the debtor's affidavit, or otherwise, that such earnings are necessary for the use of his family residing in this state, supported in whole or in part by his labor; but where debts are incurred by any such person, or his wife or family, for the common necessities of life; the one-half of such earnings above mentioned, are, nevertheless, subject to execution, garnishment or attachment to satisfy debts so incurred."

At first glance it might seem that the word "earnings of the judgment debtor for his personal services rendered" contemplate the reward paid to one for services rendered another. A technical construction of the statute would compel the adoption of such a meaning. Such construction would be at variance with the spirit of the constitution and laws of the state. Section 4, Article XIX, of the Constitution, provides that "the legislative assembly shall enact liberal homestead and exemption laws," and this court has held that statutes enacted in pursuance of this mandate should be liberally construed. (*Ferguson v. Speith*, 13 Mont. 487, 34 Pac. 1020, 40 Am. St. Rep. 459.)

The courts of the different states have encountered considerable difficulty in construing exemption statutes, but all agree that such statutes are remedial, and must be construed with liberality. One difficulty seems to have been in arriving at the true meaning of the words "earnings," "wages," "salary," and the like. The word "earn" means "to gain as a just return or recompense by service, labor, or exertion." "Earnings" is "that which is earned." (See the Standard, Century, and Webster's Dictionaries.)

In passing upon an exemption statute, the supreme court of

Massachusetts said: "We are of opinion that the word 'earnings' was used for the purpose of embracing a larger class of credits than would be included in the more common term 'wages.'" (*Jenks v. Dyer*, 102 Mass. 235.) This interpretation has been generally adopted. (See Bouvier's, Anderson's, and Black's Law Dictionaries.)

Mr. Freeman, in his work on Executions, Section 234, says: "Between the terms 'wages' and 'salary' there is no material difference when they are applied to the subject here under consideration. The former term is commonly used to denote the compensation of laborers, and the latter that of other persons of more permanent employment and more elevated stations. The term 'earnings' is more comprehensive than either of the others. It implies, as do they, that the sum due shall be claimed for the personal services of the claimant, and that it shall not include, to any substantial extent, recompense for materials furnished; but earnings need not result from work done under the direction of another, nor from manual labor."

Nor do the words "personal services rendered" necessarily contemplate that the services be rendered another. They may, in proper cases, mean the services which one renders to himself. The word "service" has different meanings. It may mean "an advantage conferred; that which promotes interest or happiness; benefit." (See Webster's and Standard Dictionaries.) One confers an advantage upon himself by striving for his own benefit, and looks upon his labor done in his own behalf as that which particularly furthers his interest and happiness. The word "render" sometimes means to "bestow or provide; furnish; to give in answer to requirement of duty or demand." (Standard Dictionary.) One provides for himself and family, and does so in answer to one of the highest requirements of duty.

In reading Section 1222, it appears that a miner has exempt from execution "his cabin or dwelling, sluices and pipes, hose, windlass, derricks, cars, pumps, tools, implements and appliances necessary for carrying on any kind of mining operations,

not exceeding in value the aggregate sum of one thousand dollars," and so forth. Now, it may be inquired, can it be that the statute exempts all these, and yet does not exempt the reward won by their use, when necessary for the support of the miner's family residing in this state? or exempts to him his tools, and in the same breath deprives him of the fruits of his toil therewith, allowing his family to go in want? Such a construction is clearly unreasonable, and demonstrates to us that, had the legislature intended to restrict the exemption granted, the word "wages" would have been employed, instead of the broader word "earnings."

Again, can it be that the legislative assembly desired to restrict the exemption to those only who are the servants of others? We think not. It has been the policy of our government since its beginning to foster that independence which follows a reliance upon one's own resources. The courts of New York, in construing a similar exemption statute, have arrived at the same conclusion to which we have come. (See *McSkimin v. Knowlton* (Com. Pl.), 14 N. Y. Supp. 283, and cases cited.)

Testing the statute under consideration by the rules of construction provided by Section 4660 of the Civil Code, we believe we correctly declare the legislative intention.

It must be remembered that in the case at bar it is conceded that the respondent is a poor man, whose family depends for support upon his personal services in working his placer mine; that the sum attached is necessary for the use of his family residing in this state; that the gold dust was mined by respondent within thirty days next preceding the levy of attachment; and that the suit brought against him was not upon a debt incurred by him for the common necessities of life. The court below, therefore, was correct in entering judgment for respondent.

But, while a liberal construction of the exemption laws should always be encouraged, it will be readily perceived that a too liberal construction thereof might lead to many abuses not contemplated by the lawmaking power, and we deem it proper to say that this case is determined and decided with reference to

the facts presented only. "Each case of this character must rest upon its own facts existing at the time in question." (*Cushing v. Quigley*, 11 Mont. 577, 29 Pac. 337.)

In our opinion, the judgment should be affirmed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment is affirmed.

MR. JUSTICE MILBURN: I dissent. The part of Section 1222 (Subsection 7) of the Code of Civil Procedure, under which the exemption is claimed, declares as exempt from levy "the earnings of the judgment debtor for his personal services rendered at any time within thirty days next preceding the levy of the execution or attachment, when it appears * * * that such earnings are necessary for the use of his family * * * supported in whole or in part by his labor. * * *"

I cannot understand that this section expresses or implies an intention on the part of the legislature to protect income from a private and independent business from levy, if such income be not for services rendered others. The words "earnings * * * for his personal services rendered" do not suggest to me any such idea. (Bouvier, Law Dict.; 22 Am. & Eng. Ency. Law (Ed. 1893), 106.) If the legislature had intended to add to the exemptions of a placer miner the gold which he might get into his sluice boxes, it would have been very easy for it to say so. But it did not. The legislature gives to the persons mentioned in the first six subdivisions of Section 1222 certain exemptions, and then expressly declares that in addition to those exemptions the debtor may have also the exemption provided in Subsection 7—that is to say, that any one of the persons whose particular property is made exempt under any one of the six subdivisions referred to may also render personal services to others and have the earnings therefor exempt. The case of *McSkimin v. Knowlton* (Com. Pl.), 14 N. Y. Supp. 283, relied upon in the commissioner's opinion, *supra*, is not, in my opinion, a well-considered case. I cannot find anything in it which

supports the proposition that placer gold, taken out of the ground by a miner by and for himself, is his earnings for personal services rendered. The learned justice in that case states that his first impression was the same which I entertain, but he states that upon examination he found that "the courts have construed the term 'personal service' to include earnings derived from a business, where the services are the chief factor in it." He seems to have had some difficulty in defining the words "personal service." So far as I can understand from what the justice says of them, the cases cited by him appear to have been cases in which services were rendered by the debtor to others, and, therefore, are not in point as sustaining the conclusion at which he finally arrived.

HARRIS, ADMINISTRATOR, APPELLANT, v. ROOT ET AL.,
RESPONDENTS.

(No. 1,925.)

(Submitted April 27, 1903. Decided May 11, 1903.)

28	159
28	201
28	159
31	423
28	159
39	474

*Attorneys — Contingent Fees — Contract — Abandonment—
Compensation—Compromise of Litigation—Receivers—Dis-
charge—Appeal.*

1. A contract for the professional services of an attorney in contesting a will provided that "your fee, in case the will is defeated and our clients get their shares, shall be one hundred thousand dollars," etc. Afterwards a compromise was effected—the attorney taking part therein—and the contest was dismissed. *Held*, that by the terms of the contract the attorney was only entitled to the stipulated fee in the event the will was actually defeated, and in compromising the case the contract was abandoned, and recovery by the attorney, if at all, must be on a *quantum meruit*.
2. *Obiter*: An attorney, as such, has no authority to compromise a controversy for his client,—a general retainer in a case does not imply such authority; there must be special authority delegated for that purpose, or a ratification by the client, otherwise the compromise agreement, as well as any judgment entered in pursuance thereof, is void at the option of the client.

3. Where a contract is for a stipulated fee contingent upon the performance of specific services by an attorney, and said services are not performed, the measure of recovery by the attorney is the value of the services actually rendered, and not the amount of the stipulated fee, notwithstanding the rendering of the specific services was prevented by the client, or by circumstances over which he had no control.
4. In an action to recover for professional services rendered by an attorney in contesting a will, the court, prior to the trial, appointed a receiver to receipt to the administrator of the decedent's estate for the defendants' shares therein, and to preserve them pending a termination of the action. Afterwards judgment went for defendants. *Held*, proper to discharge the receiver pending an appeal.

Appeal from District Court, Silver Bow County; E. W. Harney, Judge.

ACTION by John S. Harris, as administrator of the estate of Robert G. Ingersoll, deceased, against Henry A. Root and others. From a judgment for defendants, and from two certain orders made after judgment, plaintiff appeals. Affirmed.

STATEMENT OF THE CASE.

In this action the plaintiff seeks to recover a judgment against the defendants Root and Coram for \$95,000, a balance alleged to be due for legal services rendered as attorney to the said defendants by Robert G. Ingersoll, plaintiff's intestate, with interest thereon from August 24, 1897. The right of recovery is based upon the following written agreement entered into between the parties:

"Butte City, Mont., August 17, 1891.

"R. G. Ingersoll, Esq., Butte City, Montana—Sir: We agree that for your services in the contest of Maria Cummings and Henry A. Root against the probate of the alleged will of A. J. Davis, deceased, rendered and to be rendered, that your fee, in case the will is defeated and our clients get their shares, shall be one hundred (100,000) thousand dollars, and that your expenses and disbursements shall be paid in any event.

"There is to be no personal obligation against J. A. Coram in the event that the interests represented by Henry A. Root are unsuccessful, and in no event is the said J. A. Coram obligated except to pay such fee out of the funds secured from the

estate of A. J. Davis, deceased, by Maria Cummings, Lizzie S. Ladd, M. Louise Dunbar and Mrs. Ellen S. Cornue and Henry Root.

"HENRY A. ROOT.

"J. A. CORAM."

The claim is made that, while the services were rendered for Root and Maria Cummings, it was intended by the parties that they should also inure to the benefit of the defendants Elizabeth S. Ladd, Marie Louise Dunbar, and Ellen S. Cornue, who, in case the will should be defeated, would share in the distribution of the estate.

It appears from the allegations of the complaint that previous to the institution of the contest, and in order to provide means to prosecute the contest, the defendants Cummings, Ladd, Dunbar, and Cornue assigned to the defendants Root and Wells one-third of the interests claimed by them in the estate, in trust, to reimburse Root for the outlay necessary to procure counsel and to pay other expenses. It is further alleged that the defendant Coram acquired by assignment some interest in these shares, and also in the share of Root, the extent of which does not distinctly appear. Wells and the defendants other than those named are made parties in order that the amount received by Cummings, Ladd, Dunbar, Cornue, and Root, and the balance due them upon final distribution, may be ascertained, and the judgment recovered be declared a lien thereon in the hands of Leyson, the administrator with the will annexed, to secure the payment of the judgment. Andrew J. Davis died in 1890, and his estate has since that time been, and is now, in the course of administration by the district court of Silver Bow county. An account of the proceedings therein will be found by reference to the opinions of this court, published under the title "*In re Davis' Estate*," 27 Mont. 235, 70 Pac. 721, and 27 Mont. 490, 71 Pac. 757. The complaint herein sets them out with particularity, but they need not be repeated here. The allegations necessary to an understanding of this controversy are, in substance, the following: That the first contest of the probate

of the will was instituted by Root and Cummings in the year 1890; that these contestants were aided and assisted by their codefendants Ladd, Dunbar and Cornue; that, in order to prosecute the contest successfully, the services of Robert G. Ingersoll, an attorney at law of Dobbs Ferry, N. Y., were secured by the said Coram and Root; that the contest was tried in 1891, but without result, because the jury disagreed; that pending the trial the contract was entered into by Root and Coram, the latter becoming a party to it, because he had theretofore become entitled by assignment to certain interests in the shares of the contestants and their associates; that thereafter, on April 28, 1893, while the contest was still pending and undetermined, the contestants, with their associates, compromised the controversy with the proponent of the will by an agreement under the terms of which the contest was to be dismissed and the will admitted to probate; that the compromise was carried into effect by procuring a decree to be entered by the court in March, 1895, under the provisions of which the contest was dismissed, the will was admitted to probate, and Root, Cummings, Ladd, Dunbar, and Cornue were declared entitled to certain distributive shares in the estate; that thereafter other contests were instituted by other next of kin of the deceased, which were settled by a compromise similar to that of April 28, 1893, to which all persons claiming an interest in the estate were parties, and in pursuance of which a decree was entered by the court on August 24, 1897, dismissing the contests, and finally settling and determining all controversies between the proponent and the rival claimants, and declaring the shares to which each was entitled; that the said decree became the basis of the distribution of the estate, and that the contestants Root and Cummings became thereunder entitled to greater interests than they would have received had the will been finally defeated; "that by virtue and as a result of the prosecution of said objections and contests of the validity of said writing so propounded for admission to probate as the last will and testament of said Andrew J. Davis, deceased," the said compromise contract and decree were pro-

cured, and became effectual to defeat the will, and to secure to the contestants and their associates all their rights as next of kin of A. J. Davis, deceased; that the plaintiff's intestate, by procuring the contract and decree, fully discharged his obligations under his contract, and kept and performed all the conditions thereof to be by him kept and performed; that thereby there became due and he was entitled to have paid to him the full sum of \$100,000 and his expenses as stipulated therein, but that no part thereof has been paid, except the sum of \$5,000, wherefore judgment is demanded for that amount, with interest from the date of the decree.

Upon the issues made by the answers of the defendants, the cause came on for trial in the district court, sitting with a jury, on December 11, 1902. Evidence was offered by plaintiff in support of his allegations. This was objected to by the defendants Coram and Root, and the objection sustained by the court, on the ground that the complaint did not state a cause of action against them. The plaintiff having failed to amend, the jury was discharged, and judgment ordered entered for the defendants. From the judgment the plaintiff has appealed. He has also appealed from an order, made after judgment, vacating an order made prior to the trial by which a receiver was appointed to receipt to the administrator of the Davis estate for the shares of Root and his associates, and to preserve them pending a termination of this action, and also from an order subsequently made refusing to set aside the order just mentioned, and to retain the receiver pending the appeal from the judgment.

Mr. E. N. Harwood, and Mr. John Lindsay, for Appellant.

Did plaintiff's amended complaint state facts sufficient to constitute a cause of action? The determination of this question requires an interpretation of the contract in the light of the facts and circumstances surrounding the subject and purpose thereof. The facts alleged in the complaint should be liberally viewed to ascertain the intention of the parties. The court should have allowed plaintiff to prove all the facts and

circumstances surrounding and inhering in the transaction, which may properly be proved in support of the allegations of the complaint, for as so illuminated the contract is to be viewed, interpreted, and the intention of the parties ascertained and given effect. (*Heldebrand v. Fogle*, 20 Ohio, 147; 1 Greenleaf on Evidence, Secs. 277, 286; *Donnell v. Humphreys*, 1 Mont. 526; *Shreve v. Copper Bell Mining Co.*, 11 Mont. 324; *Truett v. Adams*, 66 Cal. 221; Addison on Contracts, 846; *Shore v. Wilson*, 9 Clark & Fin. 569; *Bareda v. Silsbee*, 21 How. 161; *Nash v. Towne*, 5 Wall. 689; Anderson's Dictionary, "Interpretation," 564; Anderson's Dictionary, "Construction," 240; *Lawrence v. McCalmont*, 2 How. 447; Compiled Statutes, 1887, Code Civ. Proc. Sec. 632; Century Dictionary, "Defeat," 2 Coke upon Lit., Harg. Ed. 236, Sec. 384; Bouvier's Law Dict., "Defeasance;" Comyn's Dig., "Defeasance;" 2 Blackstone, Com. 327; *Simmons v. West Va. Ins. Co.*, 8 W. Va. 486; *In re Davis' Estate*, 71 Pac. 757; *Goad v. Hart*, 128 Cal. 197, 60 Pac. 761; *Chester v. Jumel et al.*, 5 N. Y. Supp. 809; *Id.*, 26 N. E. 297; *Marsh v. Holbrook* (N. Y. Appeals), 3 Abbt. 176; *Fairbanks v. Sargent*, 104 N. Y. 108, 9 N. E. 870; *Mahoney v. Bergin*, 41 Cal. 423; *Ballard v. Carr*, 48 Cal. 74; *Howard v. Throckmorton*, 48 Cal. 482; *Mathewson v. Fitch*, 22 Cal. 86; *Thurber v. Meves*, 119 Cal. 35; *Topeka Water Co. v. Root*, 42 Pac. 715; *Moyer v. Cantieny*, 41 Minn. 242, 42 N. W. 1060; *Kersey v. Garton*, 77 Mo. 645; *Alcorn v. Butler*, 9 Tex. 56; *Myers v. Crockett*, 14 Tex. 257; *Larned v. Dubuque*, 86 Ia. 166; *Potter v. Ajax Mining Co.*, 19 Utah, 421, 57 Pac. 270; *Majors v. Hickman*, 2 Bibb (Ky.), 217; *Mackall v. Willoughby*, 167 U. S. 681, 42 L. Ed. 323; *Stanton v. Embry*, 93 U. S. 548, 23 L. Ed. 983; *Taylor v. Bemis*, 110 U. S. 42, 28 L. Ed. 64; Anderson's Law Dict., "Compromise," 218; 25 Am. Repts. 546, note; *Frank v. Murray*, 7 Mont. 4.)

Want of mutuality is no defense where the contract has been performed by one party thereto. (*Willard v. Jordan*, 76 Mich. 181, 42 N. W. 1085; *Storm v. U. S.*, 94 U. S. 76, 24 L. Ed. 42; *Robson v. Miss. River Log Co.*, 61 Fed. 983 (affirmed on

appeal); *Robson v. Miss. River Log Co.*, 16 C. C. A. 400; *Mathewson v. Fitch*, 22 Cal. 86; *Jones v. Snow*, 64 Cal. 456; *Bloom v. Hazzard*, 104 Cal. 310; *Des Moines Valley R. R. v. Graft*, 27 Ia. 99, 1 Am. Rep. 256; *Fontaine v. Baxley*, 90 Ga. 416, 17 S. E. 1015; *Marie v. Garrison*, 83 N. Y. 14; *Lancing v. Wheel Co.*, 94 Mich. 272, 34 Am. St. Rep. 341; *Mackall v. Willoughby*, 167 U. S. 681; *Harland v. Territory*, 13 Pac. 457; *Ballard v. Carr*, 48 Cal. 74; *Howard v. Throckmorton*, 48 Cal. 482; *Thurber v. Meves*, 119 Cal. 35; *Porter v. Ajax Min. Co.*, 19 Utah, 421, 57 Pac. 270; *Scott v. Jackson*, 89 Cal. 258; *Swain v. Seamens*, 9 Wall. 254.)

This action is founded upon a promise in writing, which states the consideration, as fully so as an action based upon a promissory note, or letter of guaranty, given for labor, or credit, or things delivered, or to be delivered. (*Walker v. Brown*, 165 U. S. 654, 41 L. Ed. 865.)

Even though in the adjudication of a case founded upon a contract, after one or more trials thereof, the court in the light of all the facts and circumstances, should hold that only a *quantum meruit* should be recovered the court would not then do what was done in this case. (*Cox v. McLaughlin*, 76 Cal. 63; *Walsh v. McKeen*, 75 Cal. 521.)

Mr. Charles R. Leonard, and *Mr. M. S. Gunn*, for Respondents (except *John H. Leyson*, Administrator).

MR. CHIEF JUSTICE BRANTLY, after stating the case, delivered the opinion of the court.

1. The action of the court in sustaining the defendants' objection to the evidence presents for decision the question whether the allegations in the complaint which we have stated in substance warrant recovery by the plaintiff. The complaint declares upon the contract, and unless it appears therefrom that the plaintiff's intestate fully performed the contract on his part, or facts and circumstances are alleged justifying a failure in any particular, a recovery cannot be had. The contract is clear

and explicit in its terms, and its construction involves no difficulty. To its language alone, therefore, must we look in order to find the intention of the parties. (Civil Code, Section 2203.) Taking it by its four corners, and giving to its words their ordinary and popular sense (Civil Code, Section 2209), we find that Root and Coram undertook on their part to pay the expenses of Mr. Ingersoll in any event, provided, of course, he performed the services stipulated for. Root was to pay the full amount of \$100,000, in addition to expense money, in case the will should be defeated, and he and his clients should get their shares. Coram was bound by the same undertaking, except that the amount he was to be personally liable for was in no event to exceed the amount received by his clients, including Root; that is, if they did not get anything, he was not to pay anything beyond expenses. It is therefore clear that as to him the intention was that he should not be bound except upon the happening of two contingencies, to-wit, that the will be defeated, and his clients actually get their shares. In other words, the contest was to result in success, and the funds out of which only payment could be exacted were to be secured from the estate of Andrew J. Davis. The duty to pay devolved upon him only upon the happening of these contingencies. There was included, also, the duty to devote the funds secured to that purpose. If he should not secure them, he was not compelled to pay from his own means. The obligation of Root was exactly the same, except that, if the funds secured from the estate should not be sufficient, he became personally liable for any balance. The explanation why the contract was so made is manifest. The will had been offered to probate, and a contest had been instituted by Root and Cummings which, if successful, would inure to the benefit of their associates. If it should prove a failure, they would get nothing, because, under the terms of the will, the proponent would get the whole estate, except the amount required to pay two or three small legacies. Coram was not interested in the estate. He was willing, however, to become a party to the contract, provided he could share

in the result of a successful contest, and not be held in case of failure. Mr. Ingersoll was willing to contribute to the enterprise his experience and ability, upon a contingency, provided his share was made proportionately larger; and he was willing to embody in the contract the provision that neither Root nor Coram should be liable, except upon a complete success of the enterprise through a contest, and the actual receipt by the contestants and their associates of the shares to which they would thus become entitled. A judgment sustaining the contest would not be sufficient. The shares must be received.

Counsel for the defendants contended in the court below, and contend here, that this is the only construction of which the contract is susceptible, and that as the complaint itself shows that the contestants and their associates succeeded by means of a compromise of the litigation, in negotiating which Mr. Ingersoll took part, instead of by means of a contest, which Mr. Ingersoll did not conduct to successful termination, the contract for the contingent fee was abandoned by the parties, and that a recovery against the defendants, if any may be had at all, must be upon a *quantum meruit*, for services other than those provided for by the contract. Counsel for plaintiff contends, however, that the compromise of the litigation by which the contestants obtained certain shares was *pro tanto* a defeat of the will; that under the decree the defendants have received and will receive amounts largely in excess of the sum due the estate of Mr. Ingersoll, and that in any event the procurement of a final decree settling the contest, and ascertaining the shares to which the contestants are entitled, though such decree was brought about by a compromise, was a complete discharge by Mr. Ingersoll of his obligations under the contract; and that his estate is entitled to recover on the contract.

We agree with the contention of the defendants. An attorney, as such, has no authority to compromise a controversy of his client, no matter what may be the difficulties involved, nor however advantageous the result may be to the client. A general retainer in a case does not imply such authority, and, if a

compromise of the controversy be made, it must be made under special authority delegated for that purpose. Otherwise, and in the absence of a ratification by the client, the compromise agreement, as well as any judgment entered in pursuance of it, is void, at the option of the client. (*Holker v. Parker*, 7 Cranch, 436, 3 L. Ed. 396; *Preston v. Hill*, 50 Cal. 43, 19 Am. Rep. 647; 3 Am. & Eng. Ency. of Law, 2d Ed., 358; *Jubilee Placer M'ng. Co. v. Hossfeld*, 20 Mont. 234, 50 Pac. 716.) Nor is this rule, which is sustained by the current of authority, changed or modified in any respect by Section 398 of the Code of Civil Procedure. (*Preston v. Hill*, *supra*.) Mr. Ingersoll could not, therefore, under the contract, assume the authority to make any compromise of the contest. His duty required him to prosecute it, and he could not be held entitled to recover under his contract, short of a successful result of the controversy, followed by actual distribution to his clients. Additional authority was therefore necessary to this end, and, when this was conferred by his clients and accepted by him, there was a mutual abandonment of the contract; for the negotiations were not included among his duties under the contract, and when the compromise was consummated the contract could not be performed. This impossibility of performance was the result of the subsequent mutual arrangement between him and his clients under and by virtue of which the compromise was made. The services stipulated for under the contract were therefore never performed, and the contingent fee to be paid for them could not be recovered. The contract was entire, and nothing short of entire performance would authorize a recovery upon it. Nor would the case have been different, had the compromise been effected without the aid or consent of Mr. Ingersoll, for, where the stipulation is for a contingent fee, no matter whether the rendering of the services is prevented by the client, or by circumstances over which he has no control, the measure of recovery by the attorney is the value of the services actually rendered, and not the amount of the stipulated fee. These views, we think, are correct upon principle, and are sustained by the weight of au-

thority. (*Tenney v. Berger*, 93 N. Y. 524, 45 Am. Rep. 263; *French v. Cunningham*, 149 Ind. 632, 49 N. E. 797; *Western Union Tel. Co. v. Semmes*, 73 Md. 9, 20 Atl. 127; *Polsley & Son v. Anderson*, 7 W. Va. 202, 23 Am. Rep. 613; *Agnew v. Walden*, 84 Ala. 502, 4 South. 672; *Pemberton v. Lockett*, 21 How. 257, 16 L. Ed. 137; 3 Am. & Eng. Ency. Law, 2d Ed., 427, 431, and notes.) The allegations of the complaint fall very far short of showing an entire performance of the contract. The action of the court, therefore, was correct in sustaining the objections to the introduction of evidence under the complaint, and in directing judgment upon the plaintiff's failure to amend.

2. The first order made after entry of judgment, though in form an order vacating the appointment of a receiver, was equivalent to an order discharging the receiver, and was properly made. The court had entered a final judgment. It had lost jurisdiction of the case, "except for the purpose of entertaining a motion for a new trial, or such other proceedings as might properly and lawfully be had, looking to a revision or correction of its action, or to enforce the decree as rendered. It had no authority, inherently or by statute, or by any rule of this court, to retain jurisdiction for any purpose pending the appeal." (*Finlen v. Heinze*, 27 Mont. 107, 69 Pac. 829.) It was therefore the duty of the court to discharge the receiver, who, after entry of judgment, had no other functions to perform. It necessarily follows that the court was also right in refusing to set aside the order just mentioned, and to retain the receiver pending appeal from the judgment.

The judgment and orders are affirmed.

Affirmed.

Motion to modify opinion denied May 18, 1903.

REYNOLDS, RESPONDENT, v. FITZPATRICK ET AL.,
APPELLANTS.

(No. 1,553.)

(Submitted April 29, 1903. Decided May 11, 1903.)

Chattel Mortgage — Conversion of Mortgaged Property—Defenses—Title in Third Person—Evidence—Hearsay — Appeal—Decision—Estoppel.

1. Testimony, by a mortgagee of personalty, that the one who it was claimed had purchased it told him that the owners said the sale could be made if he, the mortgagee, was willing, was inadmissible as hearsay.
2. Where on appeal, it appears that there was sufficient competent testimony to sustain the verdict, under proper instructions, and the record does not contain the instructions, it will be presumed that the court properly instructed the jury.
3. To warrant the introduction of the testimony of an absent witness, given upon a former trial, the party seeking to introduce such testimony must preliminarily prove the fact of departure or absence of such witness by positive testimony, or by the existence of circumstances from which departure or absence can be reasonably inferred.
4. A party offering the testimony of a witness on a former trial showed that a subpoena was issued, which was returned with the sheriff's indorsement that he could not find the witness, and the party testified that he heard that the witness lived at a certain place, and he had written his (the party's) daughter about it, who said she had not heard of him in two years; that he inquired of a man in another place, who said that the witness had gone to the Klondike, and inquired of other parties, who said they did not know where he was. *Held* error to admit the testimony on the former trial, as the proof failed to show that the witness was out of the state, or, if so, it did not show that he might not have started a few days before trial.
5. Testimony that a third person told plaintiff, who was seeking to introduce the testimony of a witness given at a former trial, that said witness had gone to the Klondike, was hearsay.
6. On a motion to introduce the testimony of a witness given on a former trial, the stenographer who officiated at the former trial was sworn, but did not testify that the transcript presented was a correct copy of the testimony as actually given. *Held* error to admit the testimony.
7. *Quaere*: Whether the testimony of a witness given at a former trial can be proven by the notes of the official stenographer who took it, or by a transcript of such notes.
8. In an action for conversion the burden is upon plaintiff to show either title or right of possession in himself. Proof on the part of defendant of title and possession in a third person would constitute an absolute defense to the action.
9. In an action for conversion, plaintiff did not claim to be the owner of the property converted, but claimed the right to the immediate possession thereof by reason of an alleged default in the terms of a verbal mortgage

claimed by him to cover the property. Held error to exclude testimony that, prior to any assertion by plaintiff of his rights under the mortgage, the mortgagor, who then had possession of the property, had sold the same to a third person, who had no notice of plaintiff's rights, as this evidence tended to show title in the third person, and therefore to defeat the action.

10. A party is estopped from claiming that he is not bound by a decision procured by his own appeal and solicitation.

Appeal from District Court, Deer Lodge County; Welling Napton, Judge.

ACTION by J. B. Reynolds against John Fitzpatrick and John Conley, as sheriff and deputy sheriff. From a judgment for plaintiff and from an order overruling a motion for a new trial, defendants appeal. Reversed.

Mr. W. H. Trippet, for Appellants.

Mr. H. R. Whitehill, for Respondent.

MR. COMMISSIONER CLAYBERG prepared the opinion for the court.

This case has heretofore been before the supreme court on appeal from a judgment of nonsuit, and was reversed and remanded. (*Reynolds v. Fitzpatrick*, 23 Mont. 52, 57 Pac. 452.)

A trial of the case was then had in the court below, resulting in a verdict and judgment for the plaintiff. From this judgment, and from an order overruling a motion for a new trial, the defendant prosecutes this appeal. No new or amended pleadings were filed after reversal by this court.

A very full and complete statement of plaintiff's case, and the testimony adduced in his behalf upon the first trial, is found in the opinion of the court (23 Mont. 52, 57 Pac. 452), which we adopt and refer to as a portion of the statement herein. It seems only necessary to add thereto the fact that, upon the retrial of the case, the plaintiff introduced additional testimony as to the value of the property, and the defendants introduced witnesses who also testified as to such value, and a witness who

claimed to have been a *bona fide* purchaser of the property in question from one John A. Hall, who was in possession thereof at the time of the levy of the attachments in question, claiming its ownership.

The appellants assign four errors in their brief, as follows: (1) Refusal to strike out hearsay testimony. (2) Allowing plaintiff's witnesses to testify as to the value of the property, without proper qualification therefor. (3) Permitting the testimony of John A. Hall, who testified upon the former trial, to be read in evidence and considered by the jury. (4) Refusing to allow defendants to introduce proof of a sale of all the property in question by Hall to J. V. Collins, after the levy of the attachments in question. We shall consider these several assignments of error *seriatim*.

1. As to the first error assigned. The testimony, a part of which was sought to be stricken out, is as follows: "Mr. Hall met me down here on the street, and said he was about to buy it out only if I was satisfied. Clark told him that if I was satisfied they could make the trade. * * * I did not hear the conversation, but he told me this." What Clark told Hall was undoubtedly the clearest kind of hearsay testimony, and, a seasonable objection having been made, should have been stricken out on motion.

2. As to the second error assigned. There was sufficient competent testimony introduced before the jury upon which they might have rendered their verdict for the plaintiff, under proper instructions of the court. The record does not contain these instructions, and we must presume that the court below properly directed the jury as to the consideration of the testimony adduced upon the different issues in the case. There was therefore no error upon these rulings.

3. As to the third error assigned. It is claimed that this testimony was admissible under Section 3146 of the Code of Civil Procedure, which provides: "In conformity with the preceding provisions, evidence may be given upon a trial of the following facts: * * * (8) The testimony of a witness

deceased, or out of the jurisdiction, or unable to testify, given in a former action between the same parties, relating to the same matter."

It is very apparent that, before such testimony became competent and could have been introduced, the burden of proof was upon the plaintiff to show the existence of one of the conditions of Subdivision 8, *supra*, viz: (1) That the witness was dead; (2) that he was out of the jurisdiction; or (3) that he was unable to testify. The only preliminary proof offered was: First, a subpoena issued on September 19, 1899, to the sheriff of Deer Lodge county, requiring the witness' presence in court on September 23, 1899, which was returned by the sheriff to the effect that he had failed to find the witness; and, second, the testimony of plaintiff, which is as follows: "I will state what efforts I have made in endeavoring to discover the whereabouts of Mr. John A. Hall, who was a witness in the case the last time it was tried. I wrote to my daughter at Twin Bridges; she knew him; I wrote to Twin Bridges because I heard he lived there; that was his former residence, between there and Sheridan. She said she had not heard of him in two years. I also inquired of a man in Butte who said he knew him, and he told me that Hall had gone to the Klondika. I also inquired here of McKinnon & McKay; they were acquainted with him; they said they would know where he was; they had not heard of him for a couple of years. I heard he had worked for them in the store formerly; they said they had not heard of him for a couple of years, and could not tell where he was."

This statute is but declaratory of the common law as announced by the decisions of the highest courts of several of the states, and therefore we must be guided in its application by the same rules as those applied by the common law in similar instances. We find, upon examination of the decisions, that a party seeking to introduce the testimony of a witness given upon a former trial is required to introduce preliminary evidence of the existence of the reasons for its introduction, and that, if it is sought to be introduced because of the absence of the witness

from the jurisdiction of the court, the party seeking its introduction is required to show the fact of departure or absence by positive testimony, or by the existence of such circumstances as would warrant the inference of departure or absence. In *Baldwin v. St. Louis, K. & N. Ry. Co.*, 68 Iowa, 37, 25 N. W. 918, the supreme court of Iowa uses the following language: "The fact that the witness had left the state should have been established by the testimony of some one who knew the fact, or could testify to circumstances within his knowledge which would justify the inference of such fact." (See, also, *Augusta & S. R. Co. v. Randall*, 85 Ga. 297, 11 S. E. 706; *Mawich v. Elsey*, 47 Mich. 10, 8 N. W. 587, 10 N. W. 57; *Shusser, Taylor & Co. v. City of Burlington*, 47 Iowa, 300; *Wilder v. City of St. Paul*, 12 Minn. 192.)

The state of California has a statute similar to the above, under which the courts of that state have held that the witness must be out of the state, and if he is within its borders, although at a point more than thirty miles distant from the place of trial, his testimony given at a former trial is not admissible. (*Meyer v. Roth*, 51 Cal. 582; *Butcher v. Vaca Valley Ry. Co.*, 56 Cal. 598.)

In our opinion the record fails to disclose any positive testimony that the witness had departed from or was out of the state at the time of the trial, or the existence of any circumstances from which such departure or absence could be reasonable inferred. The only testimony even tending to show this fact is that of Reynolds, who says, "I also inquired of a man in Butte, who said he knew him, and he told me that Hall had gone to the Klondike." Plaintiff did not call this man as a witness, so that he could be cross-examined and the source of his information ascertained. The testimony given was not direct or positive, but pure hearsay. No circumstances were detailed from which the inference of the fact of departure or absence could be safely drawn. What the man said may have been mere rumor. Again, plaintiff does not disclose the date of said inquiries. It might have transpired, if Hall had gone to the Klondike, that

he only started a few days before the trial, and that ample opportunity might have existed to subpoena him or to have taken his testimony anew, or that the time of such inquiry was so remote that he might have returned. All the other testimony offered was to the effect that his whereabouts was unknown, and is entirely consistent with the fact that he was within the state. Plaintiff did not show that he made any effort to communicate with the witness at his last known residence. We are therefore satisfied that plaintiff did not make such showing as to warrant the introduction of Hall's testimony given on the former trial of the case.

But again, even if proper proof had been presented to warrant the introduction of this testimony, it could not have been introduced without proof that it was actually given on the former trial. The stenographer who officiated at the former trial was sworn. He did not testify that the transcript of the testimony presented and read in evidence was a correct copy of the testimony as actually given. So that the testimony as introduced was simply a copy of the evidence given upon the former trial, without proof of its correctness. There is also a serious question as to whether the testimony of a witness given at a former trial can be proven by the notes of the official stenographer who took it, or by a transcript of such notes. (*Reid v. Reid*, 73 Cal. 206, 14 Pac. 781; *Lipscomb v. Lyon*, 19 Neb. 511, 27 N. W. 731.) But inasmuch as objection was not made on that ground, we do not decide its availability.

4. As to the fourth error assigned. It must be remembered that this action was for an alleged conversion of certain personal property. The burden was upon the plaintiff to show either title or right of possession to the property resting in himself. The right of possession was alleged and denied. Proof of title and possession of the property in a third person could be introduced, and, if satisfactory to the jury, would constitute an absolute defense to the action. (*Gallick v. Bordeaux*, 22 Mont. 476, 56 Pac. 961, and cases cited.) Plaintiff did not claim to be the legal owner of the property, but claimed the

right to the immediate possession thereof because of an alleged default in the terms and conditions of a mortgage which he claimed to hold covering the property.

A brief reference to the facts is necessary to understand the exact situation in regard to this question. Reynolds had therefore sold a part of the property in question to Maddox and Clark, and had taken a chattel mortgage from them to secure the payment of a note given by them for a portion of the purchase price. Hall, with the consent of Reynolds, purchased the property from Clark, the successor of Maddox and Clark. The supreme court, on the former appeal, held that by this purchase Hall became the owner of the property; that by the agreement between Hall and Reynolds a new, verbal mortgage was given by Hall to Reynolds, which superseded the Maddox and Clark mortgage by novation, and that the liability of Maddox and Clark was extinguished; that, after this new arrangement was completed and Hall had taken possession of the property, the same was levied upon by creditors of Maddox and Clark; that the mortgage from Maddox and Clark was void as to their creditors. Therefore the following situation existed: Hall was the owner and in possession of the property in question, subject, as between himself and Reynolds, to a parol mortgage given by himself to Reynolds. This mortgage, under the terms of Section 3861 of the Civil Code, was void as against any subsequent purchaser of the property in good faith for value. Defendants sought to show that Hall sold this property to one Collins for a valuable consideration, without notice or knowledge on the part of Collins of the existence of the verbal mortgage from Hall to Reynolds, and without notice of the claim of Reynolds, and therefore to a *bona fide* purchaser. This purchase was claimed to have been made prior to the commencement of this suit, or to the assertion by Reynolds of his right under this parol mortgage by any action or process, and prior to any attempt on his part to take possession of any of the property under the terms of the alleged mortgage. In our opinion such testimony was competent, and, if established to the satisfaction

of the jury, would have been an absolute defense to plaintiff's alleged cause of action.

Counsel for appellants insist that the decision of the supreme court on the former appeal was erroneous, and that it is not the law of the case. While there may be serious doubt as to the correctness of either of these propositions, we do not deem it necessary to consider or decide the question upon this appeal. So far as plaintiff is concerned, he is estopped from asserting or claiming that he is not bound by that decision. It was procured by his own appeal and solicitation, and he is now estopped to question it. (*Newell v. Meyendorff*, 9 Mont. 254, 23 Pac. 333, 8 L. R. A. 440, 18 Am. St. Rep. 738.) We can therefore see no good reason why appellants should contend that the former ruling of the supreme court was erroneous or is not the law of the case, at least upon this appeal; but by this language we do not desire to be understood that under proper circumstances we would or would not consider these or like questions.

We are therefore of the opinion that the decision of the court below should be reversed, and a new trial be granted.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment of the court below is reversed, and a new trial granted.

MR. CHIEF JUSTICE BRANTLY was disqualified, and took no part in the decision.

McGLAUFLIN, RESPONDENT, v. WORMSER, APPELLANT.

(No. 1,550.)

(Submitted April 28, 1903. Decided May 11, 1903.)

*Mechanics' Liens—Statutory Requirements — Compliance—
Burden of Proof—Pleading — Complaint — Sufficiency—
Costs—Witnesses—Mileage—Appeal—Review—Scope.*

1. A building contract provided that all payments should be made on the certificate of the architect that payments had become due, and that final

28	177
30	558

28	177
33	422

28	177
36	81

28	177
41	98

28	177
40	547

payment should be due when the work was completed and accepted. *Held*, that presentation of a certificate of the architect was a condition precedent to final payment.

2. A complaint in an action to enforce a mechanic's lien must state that the necessary architect's certificate was given or demanded, and, if refused, the reasons why it should have been given, or, if waived, a statement of that fact.
3. Code of Civil Procedure, Section 2131, relative to mechanics' liens, provides the statutory steps which must be taken for its assertion. *Held* that, in an action to enforce a mechanics' lien, allegations showing compliance with Section 2131 are jurisdictional, and when denied must be proven as alleged, in order to authorize decree of foreclosure.
4. Where, in a suit to enforce a mechanic's lien, no proof is made showing the existence of any lien, questions raised on appeal as to the extent or validity of the lien are not open to consideration.
5. Political Code, Section 4648, provides that witnesses "attending" a trial are entitled to 10 cents a mile each way from their place of residence to the place of trial; and Section 1866 provides that the party to whom costs are awarded is entitled to the mileage of witnesses, etc. *Held*, that a party to whom costs were awarded was entitled to mileage for witnesses who appeared and testified, irrespective of whether they were legally subpoenaed.
6. *Quære*: Whether Section 8304, Code of Civil Procedure, is constitutional?
7. An order, made after judgment, refusing to sign a bill of exceptions, cannot be considered on appeal from the judgment and from an order denying a new trial.

Appeal from District Court, Sweet Grass County; Frank Henry, Judge.

SUIT by J. R. McGlauflin against Andrew Wormser to enforce a mechanic's lien. From a judgment for plaintiff, and from an order overruling a motion for a new trial, defendant appeals. *Reversed*.

Mr. Eugene B. Hoffman, for Appellant.

The court erred in overruling the defendant's motion to re-tax the costs. (Sections 3360, 3342, 1866, Code of Civil Procedure; *Mylius v. St. L. F. S. & U. R. Co.* (Kan.), 1 Pac. 619.)

No attorney fee can be allowed as a part of the costs in a case of this kind, and if permitted by our Code, the section permitting it is unconstitutional and void in that it violates Section 6, Article III, Constitution of Montana, and Section 1, Article XIV, Amendments to the Constitution of the United States. This question was before this court in *Wortman v. Klein-*

schmidt, 12 Mont. 316, and while the majority of the court held the statute constitutional, Judge DeWitt filed a strong opinion urging that the provision was unconstitutional. Since the decision in the *Wortman Case*, the question has come squarely before the Supreme Court of the United States in *Gulf C. & S. F. R. Co. v. Ellis*, 165 U. S. 150; see, also, *Los Angeles C. M. Co. v. Campbell* (Colo.), 56 Pac. 246; *Brubaker v. Bennett* (Utah), 57 Pac. 170.

The procuring and presenting of the certificate of the architect were conditions precedent to payments, and waiver of such condition precedent must be shown by proofs of the most satisfactory kind, and will not be inferred from contradictory statements of the parties. And the making of payments from time to time on the contract price will not constitute a waiver of such condition precedent. (*Brown v. Winehill* (Wash.), 28 Pac. 1037; *Wortman v. Kleinschmidt*, 12 Mont. 316.)

The supreme court of Missouri in construing a statute quite similar to our own, has held that descriptions of the land, such as that employed by the respondent here, were too indefinite and were not a compliance with the statute, and that therefore there was no lien created. (*Mattlack v. Lare*, 32 Mo. 262; *Williams v. Porter*, 51 Mo. 441; *Wright v. Beardsley*, 69 Mo. 548; *Ransom v. Sheehan*, 78 Mo. 668.)

Mr. D. H. Kehoe, and *Mr. Sidney Fox*, for Respondent.

MR. COMMISSIONER CLAYBERG prepared the opinion for the court.

This is an action brought to foreclose a mechanic's lien. At the trial of the case, after plaintiff had introduced his evidence, defendant moved for a nonsuit, which the court overruled. Judgment followed for plaintiff. Defendant made a motion for a new trial, which was overruled. He then appealed from this judgment and the order overruling the motion for a new trial.

1. The action is based upon a written contract entered into

between the parties for the construction of a dwelling house. It provides that "all payments shall be made upon the written certificates of the architect to the effect that such payments have become due." It also provides that the different payments shall be made when certain work about the building is completed, and that the final payment shall be due "when the entire work is completed and accepted." By the terms of this contract, under the law, the obtaining and presentation of a certificate of the architect was a condition precedent to the final payment on the contract becoming due. Therefore the complaint must state that such certificate was given or demanded, and, if refused, the reasons why it should have been given, or, if waived, a statement of that fact. We find no allegation in the complaint to that effect. This being true, it is not sufficient to support the judgment given by the court below. The motion for nonsuit made by the defendant should have been sustained upon this ground. (*Michaelis v. Wolf*, 136 Ill. 68, 26 N. E. 384; *Hudson v. McCartney*, 33 Wis. 331; *Hanley v. Walker*, 79 Mich. 607, 8 L. R. A. 207; *Byrne v. Sisters of St. Elizabeth*, 45 N. J. Law, 213; *Beharrell v. Quimby*, 162 Mass. 571, 39 N. E. 407; *Cox v. McLaughlin*, 63 Cal. 196; *Schmidt v. City of North Yakima*, 12 Wash. 121, 40 Pac. 790.)

2. But again, under the statutes of this state the plaintiff was bound to allege in his complaint, and show to the satisfaction of the court or jury, that he had complied with the provisions of Section 2131, Code of Civil Procedure. He makes the following allegation in his complaint: "Fourth. That on the 8th day of October, 1898, and within ninety days from the furnishing of such material and labor, the plaintiff, in order to secure and perfect a mechanic's lien for the money so due him as aforesaid, duly filed with the county clerk and recorder of Sweet Grass county, Montana, an affidavit containing an itemized account of the amount and value of such labor and materials, with all credits and offsets, and a description of the land on which such house was built, which was duly recorded in said county clerk and recorder's office, a copy of which lien, affidavit

and account is hereto attached, and made a part of this complaint." The complaint also alleges that the property on which the house was constructed was situated in Sweet Grass county, Montana. To these allegations defendant interposed a general denial. He also interposed a specific denial as to the sufficiency of the description of the property against which the lien was claimed. These allegations and denials raised an issue necessary to be submitted to the jury and passed upon by the court or jury before any decree or judgment could be entered in the suit.

The manner of perfecting a mechanic's lien consists of various steps, which are purely statutory, and, while the statute is in some respects remedial in its nature, and thus far should be construed liberally, it creates a new right, and the statutory proceedings by which this new right is perfected and enforced must be strictly followed. (*Yerrick v. Higgins*, 22 Mont. 502-510, 57 Pac. 95.) Section 2130, Code of Civil Procedure, specifies the instances in which a lien may be claimed. Section 2131 provides the method by which it may be asserted, and specifies what constitutes a lien. If no lien is thus created, none can be enforced. Allegations of compliance with the terms of Section 2131 are, therefore, jurisdictional in an action to enforce a lien; and such allegations, when denied, must be proven as alleged, in order to authorize a decree of foreclosure of the lien. We have carefully searched the record, and fail to find any testimony even tending to prove the above allegations. There was, therefore, a failure to prove the existence of such facts as to give the court below jurisdiction to enter the decree appealed from. It must, therefore, be reversed.

No proof having been made of the existence of any lien, other questions raised by appellant as to the extent or validity of the lien claimed are not properly before us for consideration.

3. Inasmuch as the case must be remanded for a new trial, and as the costs of the former mistrial will abide the final result of the suit, we deem it proper to consider the error assigned

upon the action of the court below in refusing appellant's motion to retax costs.

The only items to which appellant objects are the items of mileage paid witnesses from Great Falls and Butte. The record does not disclose whether these witnesses were subpoenaed, but it is clearly shown that they were present and testified at the trial. Appellant insists that the amounts paid for their mileage was not an item of costs "necessarily incurred in said action," or properly chargeable against him. His counsel insists that under Section 3304, Code of Civil Procedure, a witness cannot be compelled to attend a court out of the county in which he resides, unless the distance be less than thirty miles from his residence to the place of trial. He also insists that the depositions of such witnesses should have been taken under Section 3342, Code of Civil Procedure. Section 4648 of the Political Code provides that witnesses "*attending*" a trial are entitled to ten cents per mile each way from their place of residence to the place of trial. Section 1866, Code of Civil Procedure, provides: "A party to whom costs are awarded in an action is entitled to include in his bill of costs his necessary disbursements as follows: The legal fees of witnesses, including mileage," etc. These witnesses attended court, and testified on the trial, and we think plaintiff was entitled to include their mileage in his statement of costs and disbursements, and that the court did not err in overruling the motion to retax the costs.

There may be a somewhat serious question as to the constitutionality of Section 3304, *supra*. Section 11, Article VIII, of our Constitution, provides that the process of district courts "shall extend to all parts of the state." Section 3300, Code of Civil Procedure, provides, "The process by which the attendance of a witness is required is by subpoena." If the process of the court through a subpoena extends to all parts of the state, it is difficult to understand how a witness could justify refusal to obey it, even though he resided out of the county, and more than thirty miles from the place of trial. We do not, however, desire to be understood as deciding this question, because it was

not argued before the court, and its decision is not necessary to the decision of this case.

4. One other error assigned in the brief is based upon the refusal of the court to settle and sign a certain bill of exceptions which appellant had prepared, served, and tendered to the court. The action of the court in refusing to sign the same was an order made after judgment, and to bring it to this court for review an appeal must be taken from such order. The appeal in this case is only from the judgment and the order overruling the motion for a new trial.

We are of the opinion that the judgment and order appealed from should be reversed, the case remanded and a new trial ordered.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment and order appealed from are reversed, the case remanded and a new trial ordered.

MR. JUSTICE HOLLOWAY was disqualified, and took no part in the decision.

YODER, APPELLANT, v. REYNOLDS, RESPONDENT.

(No. 1,544.)

(Submitted April 11, 1903. Decided May 11, 1903.)

Fraudulent Conveyances—Admissibility of Evidence—Objections to Evidence—Motion to Strike Out Evidence—Waiver—Instructions.

1. Civil Code, Section 1372, provides that the good will of a business is property, transferable like any other. A debtor transferred his stock of goods by an itemized bill of sale, which did not include the good will of the business. Held, on an issue of fraud towards creditors in the conveyance, that evidence as to the value of the good will was inadmissible.

28	183
28	434
28	183
28	54
28	423
28	521
28	183
32	93
32	99
28	183
35	7

2. Where a question asked a witness calls for evidence which is wholly inadmissible for any purpose, it is not error for the court to sustain a mere general objection to it.
3. Where an offer of testimony includes that which is admissible with that which is not, and the competent and incompetent are blended together, it is not error for the court to sustain a mere general objection to its admission.
4. A party who permits incompetent testimony to go in without objection waives his right to object, and cannot move to strike it out.
5. Where testimony is offered which may be competent upon the showing made, and therefore no objection is made to it, and its incompetency is afterwards developed; or when incompetent testimony is volunteered by a witness in response to a proper question, such testimony should be stricken out on motion.
6. On an issue of fraud towards creditors in a debtor's conveyance, the court instructed that if a prior transfer from his partner to the debtor was made without consideration or secretly, or for any fraudulent purpose, or to allow the debtor to make the transfer in question with intent to defraud creditors of the partnership, then the conveyance in issue would be invalid. *Held* error, as permitting the conveyance to be invalidated though the grantee was an innocent purchaser for value.
7. The court further instructed that if the grantee was not at the time of the conveyance the legal or real owner of notes given by the debtor, the cancellation of which was the consideration for the conveyance, but the facts concerning the true ownership were concealed for the purpose of defeating partnership creditors, the conveyance would be void. It appeared that the notes were signed by the grantee, and given to a payee who afterwards became his wife. *Held*, that both instructions were, as a whole, erroneous, as telling the jury, in effect, that the grantee did not have the right to secure himself by purchasing the property in good faith, even though he was liable on the notes.
8. The latter instruction was also erroneous, as it was immaterial to the creditors of the partnership whether the ownership of the notes was in the grantee or his wife.
9. The court instructed that if the prior transfer to the debtor from his partner was not made for value or in good faith, and was not disclosed to creditors, then it would not vest the title in the debtor alone, but, if the partnership or the debtor continued to carry on the business under the partnership name, then the conveyance would be void towards creditors of the firm. *Held* error, as whether the transfer between the partners was fraudulent or not, it gave to the debtor the legal title, so as to enable him to give an absolutely good title to a *bona fide* purchaser.
10. Instructions must be warranted by the pleadings and evidence.
11. Instructions should not be argumentative in form.
12. It is error for the court in an instruction to comment on the weight to be given the evidence of the parties to the action.
13. It is error for the court to give conflicting instructions.
14. In a suit for the conversion of personalty, and also damages for a trespass on realty possessed by plaintiff as a tenant, it is error to instruct that the burden is on the plaintiff to show his right to the possession of "the property in controversy," since, though the leasehold was in controversy, plaintiff was—under the proofs adduced—entitled to nominal damages for the defendant's trespass thereon.
15. Where a sheriff levies on personalty in defendant's warehouse, and remains in possession of the premises, defendant is entitled to nominal damages, even though no special damage is shown.
16. It is error for the court in an instruction to incorrectly state the initials of a party's name.

17. A court, in its instructions, should be brief and clear, it should not indulge in needless repetition and legal verbiage, nor should it attempt to give all the law extant upon the subject under consideration.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

ACTION for conversion of personalty and for trespass on realty by A. N. Yoder against S. J. Reynolds. From an order refusing a new trial after judgment for defendant, plaintiff appeals. Reversed.

Messrs. McBride & McBride, for Appellant.

Under the law, as it existed in 1896, the first in time was first in right; and plaintiff, by his diligence, obtained a preference which it was the duty of the court to protect. (Civil Code, Secs. 4483, 4513; Bump on Fraudulent Conveyances, 183; *Greene v. Tanner*, 49 Mass. 411; *Hubbard v. Taylor*, 5 Mich. 155.)

In March, 1896, a creditor violated no rule of law when he took payment of his demand in good faith, although others were thereby deprived of all means of obtaining satisfaction of equally meritorious claims. (*Gray v. St. John*, 35 Ill. 222; *Hill v. Bowman*, 35 Mich. 191; *Ames & Frost v. Heslet*, 19 Mont. 188.)

An instruction not based upon evidence in the case is erroneous. (*Brownell v. McCormick*, 7 Mont. 12, 17; *Kelley v. Cable Co.*, 7 Mont. 20; *Walsh v. Mueller*, 16 Mont. 180; *Goodkind v. Gilliam*, 19 Mont. 385-388.)

Instructions 5 and 6 are erroneous in that they are argumentative, and purport to express the opinion of the court upon the evidence in the case; moreover, instruction 6 ignores entirely the rights of the plaintiff as a *bona fide* purchaser. (*Wastl v. Montana Union Ry. Co.*, 17 Mont. 213; *Knowles v. Nixon*, 17 Mont. 473; *State v. Gay*, 18 Mont. 61-62.)

Conflicting instructions will not be sustained. (*Kelley v. Cable Co.*, 7 Mont. 70; *Walsh v. Mueller*, 16 Mont. 180.)

As to the rule applicable to a case where partnership property has been applied to the payment of the individual debt of one of the partners, see, *Huiskamp v. Moline Wagon Co.*, 121 U. S. 310-323; *Case v. Beauregard*, 99 U. S. 119-125; *Howe v. Lawrence*, 9 Cush. 553, 57 Am. Dec. 68, and cases there cited; *Locks v. Lewis*, 124 Mass. 1.

The right of a simple contract creditor of a partnership to have the assets of the firm first applied to the payment of the firm debts does not amount to a lien upon the property, but is a mere equity, which vanishes when the partners part with their interest in the property. (*Stahl v. Osmers*, 31 Oregon, 199, 49 Pac. 958.)

Instruction No. 11 does not correctly state the law applicable to this case, for the reason that there was no evidence of any bad faith on the part of either the seller or purchaser. (*Curtis v. Valiton*, 3 Mont. 156.)

A partner, as such, may, when his copartner has wholly abandoned the business to him, dispose of the whole partnership property at once to a creditor. (*Steinhart v. Fyhrrie*, 5 Mont. 473, and cases cited; Code of Civil Procedure, Sec. 3232.)

Messrs. Forbis & Mattison, and *Mr. M. J. Cavanaugh*, for Respondent.

Where there is evidence to support a finding or verdict it will not be disturbed by the appellate court although it may be claimed that it appears to be against the weight of evidence. (*Merchants' Bank v. Greenhood*, 16 Mont. 430, 41 Pac. 250; *Orr v. Haskell*, 2 Mont. 228.)

The contention of the appellant that the verdict is not sustained by the evidence, cannot be considered on this appeal, for the reasons that his specifications as to the particulars in which the evidence fails to support the verdict are too vague and indefinite; and besides the verdict might still stand if the lack of evidence he mentions was a fact. (*Zickler v. Deegan*, 16 Mont. 200; *Griswold v. Boley*, 1 Mont. 553; *Froman v. Patterson*, 10 Mont. 107; *Bass v. Buker*, 6 Mont. 442; *Stafford v. Horn-*

buckle, 3 Mont. 493; *First Nat'l Bank v. Roberts*, 9 Mont. 333; *Strasburger v. Beecher*, 20 Mont. 145-49, p. 740.)

This court will not set aside the order refusing to grant a new trial unless the lower court could have directed a verdict for plaintiff at the close of the case; this cannot be done where there is a question as to the credibility of the evidence; whether the facts be disputed or undisputed if different minds may honestly draw different conclusions, the case should be left with the jury. (*Stephens v. Pendleton*, 85 Mich. 137; *Frankenthall v. Goldstein*, 44 Mo. App. 189; *Avary v. Perry Stove Mfg. Co.*, 96 Ala. 406.)

If the trial court could not have justly directed a verdict in favor of plaintiff at the close of this case, this court should not disturb the order for lack of evidence; it devolved upon the plaintiff to prove his title to the property; the jury had the exclusive right to weigh and pass upon the credibility of his testimony; therefore the jury could not have been properly deprived of this function by a direction for plaintiff. (*Pickel v. Isgrigg*, 6 Fed. 676; *Goodman v. Ford*, 23 Miss. 592; *Maus v. Montgomery*, 11 S. & R. (Pa.), 329; *Fritz v. Clark*, 80 Ind. 591; *Penn. Mining Co. v. Brady*, 16 Mich. 332; *Roberts v. Field*, 27 Mich. 337.)

Error in refusing or giving instructions will not authorize a reversal of the judgment where the verdict is manifestly right upon the whole case. (*Mann v. Higgins*, 83 Cal. 66; *O'Callahan v. Bodie*, 84 Cal. 489; *Castagno v. Carpenter*, 14 Colo. 524; *Wyman v. Filker*, 18 Colo. 382.)

It must have prejudiced some substantial right of appellant. (*Low v. Woerlin*, 77 Cal. 94; *Fredericks v. Judah*, 73 Cal. 604; *Quinn v. Quinn*, 81 Cal. 14; *Coddy v. Chicago*, 5 Dak. 97.)

Where it appears that the jury were not misled the order will not be disturbed. (*Chalmers v. Chalmers*, 81 Cal. 81; *Murray v. White*, 82 Cal. 119.)

Error in a detached phrase, sentence or section is not rever-

sible where it is so qualified by the remainder of the charge that, regarded as a whole, the law is stated with substantial correctness. (*Monnahan v. Pac. Roll. Mill*, 81 Cal. 190; *People v. Clark*, 84 Cal. 573; *Rosenbuck v. Raymer*, 13 Cal. 451.)

As to motives of parties to transfer, see, *Power v. Alston*, 93 Ill. 587; *Phelps v. Curts*, 80 Ill. 112; *Morrison v. Bemis*, 69 Ill. 537; *Moore v. Wood*, 100 Ill. 454; *Skow'n Bank v. Cutler*, 49 Me. 318.

The doctrine of reputed ownership would entirely justify the jury in ignoring the transfer as claimed to have been made from Lorenzo Graehl to Hyrum Graehl. (*Ex parte Hare*, 1 Deac. 16, 2 Mont. & A., 478, per Erskine, Ch. J.; *Ex parte Newton*, 1. M. D. & D. 252; *Ex parte Hunter*, 2 Rose, 382; *Hogard v. McKinzie*, 25 Beau. 493; *Whitman v. Leonard*, 3 Pick. 177.)

Lien of creditors on firm property is paramount to that of individual creditors though the latter attach first. (*Todd v. Lorah*, 75 Pa. St. 156; *Chase v. Steel*, 9 Cal. 64; *Conroy v. Woods*, 13 Cal. 626; *Lindley v. Davis*, 6 Mont. 453.)

Neither the court in its charge nor counsel in his request for instructions has any right to assume that the matter is proved merely because there is no conflict of testimony in regard to it; as there may be a question as to the weight and credit which should be given to the testimony. (*People v. Webster*, 111 Cal. 381; *Barry v. Hoffman*, 6 Md. 86; *Saar v. Fuller*, 71 Iowa, 427; *Rhodes v. Lowry*, 54 Ala. 4.)

If the order of the court can be supported upon any theory it will not be disturbed. (*State v. Schnepel*, 23 Mont. 523.)

Appellant claims that many of the instructions given at the request of the respondent were not warranted by evidence. This fact, if it were a fact, is not necessarily reversible error. Except it appear that the jury were misled by such instructions to the injury of appellant, the order will not be reversed. (*People v. Divine*, 95 Cal. 227; *Rara Avis Mining Co. v. Bouscher*, 9 Colo. 385; *People v. Cochran*, 61 Cal. 548; *Berry v. Missouri Pac.*, 124 Mo. 223.)

An instruction cannot be deemed erroneous if there be any evidence, however slight, upon which to base it. (*Goodell v. Bluff City Lum. Co.*, 57 Ark. 203; *Sawyers v. Drake*, 34 Mo. App. 472.)

The mistake in the initials of the plaintiff, in instruction No. 17, is not ground for reversal. (*Salina M. & E. Co. v. Hoyne*, (Kan. App.) 63 Pac. 660.)

MR. COMMISSIONER CALLAWAY prepared the opinion for the court.

In order to arrive at an understanding of the issues involved in this appeal, it is necessary to state the case somewhat in detail.

It appears from the record that one Jacobson and Hyrum Graehl were engaged in the grocery business in Butte for some years prior to 1894 under the name of Jacobson & Graehl, and that Lorenzo Graehl bought Jacobson out, probably in 1894, and the firm then became Graehl & Graehl. On August 19, 1890, H. Graehl and A. N. Yoder executed to Hattie C. Libby a note for \$300, due in six months after date, and bearing interest at one per cent per month. On August 22, 1893, H. Graehl and A. N. Yoder executed to Hattie C. Libby a note for \$350, due in one year after date, and bearing interest at one and one-half per cent. per month. On January 22, 1896, Graehl & Graehl and A. N. Yoder executed to W. A. Clark & Bro. a note for \$300, due in sixty days after date, and bearing interest at one per cent. per month. At the time of the trial, Hattie C. Libby had become the wife of the plaintiff, Yoder. A bill of sale was introduced in evidence, which purports to have been executed by Lorenzo to Hyrum Graehl on March 6, 1896, and which conveys to Hyrum all of Lorenzo's right, title and interest in the firm and business of Graehl & Graehl for a consideration of \$500. After executing this bill of sale, Lorenzo went prospecting in Madison county, where he remained some six or seven months. On

March 17, 1896, Hyrum Graehl executed and delivered to the plaintiff, Yoder, a bill of sale, whereby he conveyed all his "right, title, and interest in and to the following described personal property," describing it in detail—such as "2,000 lbs. flour, 300 lbs. corn meal, 300 lbs. bacon, 4 chests tea," etc. No mention is made in this bill of sale of the good will of the business. The plaintiff testified: "On the 17th day of March I bought this stock of goods at 101 South Main street. I found H. Graehl in possession there. The consideration that I paid for that stock of goods was \$1,100. I paid it by those notes and other money that he had borrowed up to that time." The Libby notes are indorsed as follows: "March 17, '96. Received payment in full to date from A. N. Yoder. Hattie C. Libby." The W. A. Clark & Bro. note bears this writing on its face: "Canceled. Paid for stock. A. N. Yoder." It is indorsed: "Pay to A. N. Yoder or order without recourse, W. A. Clark & Bro., per Alex. J. Johnston, Cash." When the bill of sale from Hyrum Graehl to plaintiff was executed, one Joseph Graehl, a brother of Lorenzo and Hyrum, was present, and at the same time Hyrum sold and transferred to said Joseph Graehl all of the book accounts of the firm of Graehl & Graehl. When these legal documents were completed, plaintiff testified that he took possession immediately—it was then eleven o'clock at night—and placed Joseph Graehl in charge as his agent. On the next day the defendant, who was then sheriff of Silver Bow county, acting under a writ of attachment issued in an action wherein A. F. Bray was plaintiff and the firm of Graehl & Graehl were defendants, took possession of the stock of goods described in the bill of sale from Hyrum Graehl to plaintiff, and also took possession of plaintiff's storeroom. He demanded the keys of plaintiff, and, upon receiving them, put the plaintiff out, locked the doors, and kept possession of the storeroom for about forty-five days. In due time Bray recovered judgment against the Graehls, had execution issued thereon, and the defendant, as

such sheriff, sold the goods claimed by plaintiff in pursuance thereof. The plaintiff then began this suit.

Plaintiff states his cause of action in two counts. The first is in the usual form of an action for damages for the wrongful conversion of personal property, the plaintiff praying for judgment against the defendant in the sum of \$1,150. In the second cause of action the plaintiff alleges "that on the 18th day of March, 1896, he was the owner and in possession, and entitled to the possession, of all the following described property, to-wit." Then follows a description of the personal property as shown in his bill of sale, and then this allegation: "That on the said 18th day of March, 1896, plaintiff was then and there the owner of said stock of goods, and of a leasehold estate in and to the said storeroom and premises, and was engaged in a profitable business in selling and dealing in groceries at retail at No. 101 South Main street, Butte, Montana." Then, "that on the said 18th day of March, 1896, the defendant wrongfully and without the consent of plaintiff entered upon the said premises, and ousted and ejected plaintiff therefrom, and took possession of the said stock of goods, and wholly deprived plaintiff of his said stock of goods and of his said storeroom and place of business, and wholly destroyed plaintiff's said business, to the damage of plaintiff in the sum of one thousand dollars."

The defendant denies generally the allegations of both counts of plaintiff's complaint, and pleads justification as to each. He alleges that, as the sheriff of Silver Bow county, he took the personal property described in plaintiff's complaint under and by virtue of a writ of attachment issued out of the district court of his county in an action wherein A. F. Bray was plaintiff and the firm of Graehl & Graehl were defendants, and that all of the property so attached was the property of Graehl & Graehl at the time of the attachment; "that the plaintiff herein, A. N. Yoder, claims to have been entitled to the possession, and to have been the owner of all the said property attached as aforesaid, and described in the complaint herein, on said March 18,

1896, by virtue of a pretended bill of sale of said property executed on said day to said A. N. Yoder by said Hyrum Graehl, but defendant alleges that the said pretended bill of sale was a covinous and fraudulent transfer, made without valid consideration in law, not accompanied by immediate actual and continued change of possession, and not an absolute transfer of said property as it pretended to be, but a transfer in trust to secure said A. N. Yoder for an individual indebtedness of Hyrum Graehl, contracted long prior to his partnership with Lorenzo Graehl as Graehl & Graehl, and with a secret understanding with said Yoder that, whatever of said property or its proceeds remained after paying such individual indebtedness, such balance should be paid to Graehl & Graehl, or revert to them as their property; that said transfer was made with intent to hinder, delay, and defraud the creditors of said firm of Graehl & Graehl, and prevent the enforcement of their demands against Graehl & Graehl, and was such a conveyance as would hinder, delay, and defraud the creditors of the said Graehl & Graehl." In this affirmative defense no justification is attempted to be made by defendant for his possession of plaintiff's storeroom.

The plaintiff, by replication, denies all the affirmative matter asserted in the answer.

It is proper to suggest that the pleadings of the respective parties were treated by them as sufficient in the court below. Upon the trial the jury found for the defendant. From an order denying plaintiff's motion for a new trial, he prosecutes this appeal.

1. At the trial the plaintiff was asked: "Q. Do you know anything relative to the value of the good will of the business which you had purchased there on the 17th day of March? A. Yes; I think I do. Q. What was the good will of that business worth?" This latter question was objected to "for the reason that it calls for a speculation and is too remote." The court sustained the objection, and plaintiff assigns error. The court's ruling was correct, but for other reasons than those

urged. No foundation was laid for any such evidence either in the pleadings or in the previous testimony of the plaintiff. The good will of a business is property, transferable like any other (Section 1372, Civil Code), but it does not appear that the plaintiff ever purchased the good will of the firm of Graehl & Graehl. On the contrary, the plaintiff received from Hyrum Graehl an itemized bill of sale, particularly specifying the property sold, and evidence could not be received to add to the terms of this writing, so as to show that the good will formed a part of the act of sale. (*Hebert v. Dupaty*, 42 La. Ann. 343, 7 South. 580.)

The question asked called for evidence which was wholly inadmissible for any purpose and it was therefore subject to a mere general objection, which that urged was, in effect.

2. The plaintiff was asked the following question: "Taking into consideration the fact that you had a leasehold interest in that storeroom, and that you were deprived of the possession of the storeroom, and that you were deprived of a building to carry on the business, by reason of the sheriff of Silver Bow county, Montana, taking possession of that storeroom, what amount of damage did you suffer by reason of the taking of the building and good will of the business and storeroom by the sheriff?" This was objected to "for the reason that such damage is merely speculative or prospective damage, and does not relate to the actual damage, and there has been no evidence offered tending to show that the business was carried on there at any profit, but, rather, at a loss." The court sustained the objection, to which plaintiff takes exception.

In this ruling the court did not err. The objection amounted to a mere general one. When an "offer of testimony includes that which is admissible with that which is not, and the competent and incompetent are blended together, it is not the duty of the court to separate the legal from the illegal, but the whole may be rejected when objection is made," and the party against

whom the ruling is made cannot complain because the objection is too general. (Jones on Evidence, Sec. 897.)

3. The plaintiff complains because the court refused to strike out certain incompetent testimony of the witness Bray. An inspection of the record discloses the fact that the plaintiff sat by and allowed it to go to the jury without objection, and afterward moved to strike it out. If the testimony had been favorable to plaintiff, presumably he would have been satisfied to allow it to remain. In permitting it to be adduced without objection, he took the chance of being injured, should it prove unfavorable. It is the settled law that one must object to improper testimony when it is offered, or abide the result. The failure to object at the proper time waives the error. (Jones on Evidence, Sec. 898; *Hughes v. Ward*, 38 Kan. 452, 16 Pac. 810; *Cleveland C., C. & I. Ry. Co. v. Wynant*, 134 Ind. 681, 34 N. E. 569; *Dallmeyer v. Dallmeyer* (Pa.), 16 Atl. 72; *Chicago, St. L. & P. R. R. Co. v. Champion*, 9 Ind. App. 510, 36 N. E. 221; *Perkins v. Brainerd Quarry Co.* (Com. Pl.), 32 N. Y. Supp. 230; *Haverly v. Elliott*, 39 Neb. 201, 57 N. W. 1010; *Vermillion Artesian Well, etc. Co. v. City of Vermillion*, 6 S. Dak. 466, 61 N. W. 802.) An exception to this rule is that when testimony is offered which may be competent upon the showing made, and its incompetency is afterwards developed, either by the subsequent testimony of the witness, or upon his cross-examination, or when incompetent testimony is volunteered by the witness in response to a proper question, it should be stricken out on motion.

4. The court gave the jury the following instruction at the request of the defendant: (No. 1) "If you believe from the evidence that the alleged transfer of his interest in the partnership from Lorenzo Graehl to Hyrum Graehl was made without consideration or secretly, or for any fraudulent purpose, or to allow said Hyrum Graehl to make a transfer of the partnership property to Yoder upon the notes given in evidence, and with intent to hinder, delay, and defraud creditors of the partner-

ship in that way, then you must find that the bill of sale or transfer from Hyrum Graehl to A. N. Yoder of the stock of goods afterwards attached was not a legal or valid conveyance, and did not prevent the levy of the attachment by the creditors. And if you find that the plaintiff, Yoder, was not the legal or real owner of the notes introduced in evidence, at the time of the said transfer of the stock of goods, but the facts concerning the true ownership of said notes were concealed for the purpose or with the designed effect of defrauding or defeating creditors of said partnership, or that the indebtedness evidenced by the said notes, or any of them, was the individual indebtedness of said Hyrum Graehl, and not of the partnership, and that the partnership still existed as to the creditors up to the time of such alleged sale, then you must disregard such transfer, as the same would not be supported, in law, under such facts, but would be void as to the rights of the creditors of said partnership." This was error. This instruction practically told the jury that if Lorenzo Graehl had transferred his interest in the partnership to Hyrum without consideration or secretly, or for any fraudulent purpose, or to enable Hyrum to commit a fraud, then it should find against the plaintiff, even though he be an innocent purchaser in good faith, and for a valuable consideration. The bill of sale might have been fraudulent between the Graehls, but how could that have prejudiced the rights of one who knew nothing of such fraud? This instruction also erroneously told the jury, in effect, that the plaintiff did not have the right to secure himself by a *bona fide* purchase of the property, even though he was liable for the payment of the three notes introduced in evidence.

Another ground of criticism of this instruction is that there was no evidence adduced by either plaintiff or defendant as to whether the ownership of the notes was concealed by any one. Instructions must be warranted by the pleadings and evidence. (*Brownell v. McCormick*, 7 Mont. 12, 14 Pac. 651; *Kelley v. Cable Co.*, 7 Mont. 70, 14 Pac. 633; *Walsh v. Mueller*, 16

Mont. 180, 40 Pac. 292; *Goodkind v. Gilliam*, 19 Mont. 385, 48 Pac. 548.) But we fail to see what difference it could make to the creditors of the firm of Graehl & Graehl whether the ownership of the notes was in the plaintiff or Hattie C. Libby, so long as the firm was liable for the payment thereof.

5. Instruction No. 2 is erroneous because not warranted by the evidence. The alleged sale to plaintiff was made by Hyrum Graehl, and not by the firm of Graehl & Graehl. This is one of the undisputed facts in the case.

6. We cannot approve of instruction No. 5. It is argumentative in form, and likely to prejudice the jury. The principles of law treated by it may be easily stated to the jury without resort to innuendo.

7. In instruction No. 6 the court commented on the weight to be given the evidence of the parties to the action. This was error. "The jury being the sole judges of the weight to be given to the testimony, the court should not tell them what particular weight to give to any portion thereof." (*State v. Gleim*, 17 Mont. 17, 41 Pac. 998, 31 L. R. A. 294, 52 Am. St. Rep. 655; *Wastl v. Montana Union R. R. Co.*, 17 Mont. 213, 42 Pac. 772; *Knowles v. Nixon*, 17 Mont. 473, 43 Pac. 628; *State v. Gay*, 18 Mont. 51, 44 Pac. 411.) And while the court gave the true rule at the end of this somewhat lengthy instruction, that did not remove or overcome the objectionable feature mentioned; as completed, different portions of the instruction are conflicting, and it is therefore misleading.

8. Instruction No. 8 is as follows: "If you find from the evidence that the alleged sale from Lorenzo Graehl to Hyrum Graehl about March 6, 1896, was not made for valuable consideration, or in good faith as to the creditors, and was not published or given notice of to the creditors, but remained secret, then you will not consider such transfer as vesting the title to said property in Hyrum Graehl alone; but if you find that the Graehls or Hyrum Graehl continued to carry on business at the same place in the same manner as before, under the name and

style of Graehl & Graehl, then a transfer from him alone to the plaintiff, Yoder, would not be valid as against the creditors of said firm." This is erroneous. Whether the bill of sale from Lorenzo to Hyrum was fraudulent or not, it conveyed to Hyrum the legal title to the property, so far as Lorenzo was concerned, and placed Hyrum in a position to give an absolutely good title to one purchasing in good faith, for a valuable consideration, and without notice of existing defects. In order to vitiate the sale from Hyrum Graehl to plaintiff, it was incumbent upon the defendant to affirmatively connect the plaintiff with the fraud, if any there was.

9. Instruction No. 9 is incorrect because not warranted by the evidence. That Lorenzo Graehl conveyed his interest in the partnership to Hyrum by bill of sale dated March 6, 1896, was conceded. Therefore this instruction is erroneous for the same reasons given as to instruction 8.

10. Instruction No. 16 reads, in part, as follows: "The jury is instructed that the burden of proof is on the plaintiff to show by the preponderance or greater weight of the evidence his right to the possession of the property in controversy." In this instruction the court should not have used the words "the property in controversy." The plaintiff's leasehold interest in the storeroom was a part of the property in controversy, and this the defendant did not levy upon. So far as the record is concerned, the defendant was a trespasser in the storeroom, of which he retained possession for about forty-five days. While there was no proof as to any special damage sustained by plaintiff upon this branch of the case, he was, under the proofs adduced, entitled to nominal damages for the defendant's trespass.

11. Defendant's instruction 17 is erroneous for the same reason assigned as to instruction No. 16. It should also have correctly stated the initials of plaintiff's name.

12. The court instructed the jury at great length. Eighteen pages of the record are taken up by the instructions. Whether they are all in the record, we do not know, but it appears to con-

tain over thirty of them. Those before us were not numbered by the court, and we have been obliged to designate them by the numbers given in appellant's brief.

How the jury could have been aided in its labors by this mass of reading is conjectural. Aside from being of such great length, the instructions are replete with repetition and legal verbiage. Instructions are given to a jury to enlighten, not to confuse, it. The court should not attempt to instruct a jury as to all the law extant upon the particular subject under consideration. In the case at bar a few brief and clear instructions would have been ample to aid the jury in its investigations.

For the reasons given, we are of the opinion that the order should be reversed, and the cause remanded for a new trial.

PER CURIAM.—For the reasons given in the foregoing opinion, the order is reversed, and the cause is remanded for a new trial.

FOLEY, ADMINISTRATOR, APPELLANT, v. KLEINSCHMIDT
ET AL., RESPONDENTS.

(No. 1,570.)

(Submitted May 12, 1903. Decided May 13, 1903.)

*Attorney — Compensation — Conditional Contract — Client's
Dismissal of Appeal—Effect.*

Where an attorney contracts to perform services in pending suits for a certain sum, a portion of which is to be paid in installments upon their favorable termination, and sues upon the contract, the fact that adverse judgments were rendered will defeat his recovery, though the client, on the advice of another attorney, dismissed appeals therefrom; the proper remedy being to sue on a *quantum meruit*.

*Appeal from District Court, Lewis and Clarke County; S.
McIntire, Judge.*

ACTION by B. H. Foley, as administrator of the estate of Rollin P. Blanchard, against Albert Kleinschmidt and others. From a judgment for defendants, entered on a nonsuit, and from an order denying a new trial, plaintiff appeals. Affirmed.

Mr. Charles J. Geier, for Appellant.

Mr. Massena Bullard, for Respondents.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought to recover of the defendants a judgment for a balance alleged to be due plaintiff's intestate for legal services rendered by him for the defendants. The complaint contains two causes of action. The first declares upon a contract in writing, under the terms of which the deceased undertook to prepare briefs in two certain causes, in which the defendants herein were defendants, for the stipulated sum of \$750, \$200 of which was to be paid down, and the balance in installments of \$250 each, upon the determination of the two causes, respectively, and entry of final judgments therein in favor of the defendants. The breach of the contract upon which recovery is claimed is alleged as follows: "That plaintiff well, promptly, and to defendants' entire satisfaction, prepared and furnished said briefs," and "that defendants, though often thereto requested, have not paid said sum, or any part thereof, exceeding about \$250." There is no allegation that said causes have been determined in favor of the defendants, or at all. The second cause of action is upon a *quantum meruit* for services rendered in the same causes at the request of the defendants, of the alleged value of \$1,000, no part of which has been paid by the defendants. Judgment is demanded for the sum of \$1,500.

At the hearing the second cause of action was abandoned, evidence being offered in support of the first only. This evidence established without contradiction—though it was made to ap-

pear that the briefs had been prepared and furnished to the defendants in accordance with the terms of the contract—that both of the causes mentioned in the contract had resulted in final judgments against the defendants; that appeals had been taken therefrom to this court; and that subsequently the appeals were dismissed by the defendants under the advice of other counsel regularly employed in the causes. At the close of plaintiff's evidence, and upon motion of the defendants, a nonsuit was granted, and judgment entered in favor of the defendants for costs. From this judgment, and an order denying a new trial, plaintiff appealed. The plaintiff having died pending his appeals, the present plaintiff, Bernard H. Foley, administrator, was substituted in his stead.

Complaint is made that the district court erred in granting the motion for nonsuit and directing judgment for defendants. One of the grounds of the motion was that, under the terms of the contract, nothing was to be paid, besides the cash payment, except upon the entry of final judgment in one or both of the causes mentioned therein in favor of defendants, and that the evidence showed affirmatively that adverse judgments had been entered in both. The action of the district court was therefore correct. The contract was an entire contract, and payment thereunder was due upon a contingency. No recovery could be had thereon without allegation and proof that the contingency provided for therein had happened; nor was the situation aided in any way by the fact that the appeals to this court were dismissed by the defendants themselves under the advice of other counsel in the causes, thus preventing the possibility of a favorable judgment upon the determination of the appeals. If plaintiff had any right to recover on the ground that the happening of the contingency was prevented by the act of the defendants, he could still not recover upon the contract, but must be relegated to his action upon a *quantum meruit* for the value of the services actually rendered. This case falls entirely within the

principle declared in *Harris v. Root* (decided by this court at the present term), 28 Mont. —, 72 Pac. 429.

There being no other error assigned which shows any merit, the judgment and order must be affirmed.

Affirmed.

28 201
30 392

ROE, APPELLANT v. HAWES ET AL., RESPONDENTS.

(No. 1,571.)

Appeal—Implied Finding—Record on Appeal—Preservation of Evidence—Review.

In an action tried to the court, defendants denied all the allegations of the complaint and specially pleaded the statute of limitations. On appeal by plaintiff from the judgment, the only assigned error was that "the court erred in giving judgment against appellant, for in so doing he evidently held the statute of limitations had run against the action." *Held*, that as there was nothing in the record disclosing the reason why the court found and entered judgment in favor of defendants, it would be presumed—under the doctrine of implied findings—that the court found that the plaintiff failed to make out a *prima facie* case on the merits, hence, the evidence not being in the record, the judgment must be affirmed.

Appeal from District Court, Flathead County; D. F. Smith, Judge.

ACTION by Christ Boe against Ira Hawes and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Mr. David Ross, and Mr. F. Joe Rice, for Appellant.

PER CURIAM.—This action was brought against the defendants as sureties on the official bond of one Eugene M. McCarthy, constable. In the answer to the plaintiff's complaint, defendants denied all the allegations thereof, and specially pleaded the statute of limitations. The cause was tried to the court without a jury, and witnesses were sworn for the plaintiff. The

court found for and entered judgment in favor of the defendants and against the plaintiff. The evidence is not in the record. Plaintiff appeals from the judgment.

The only assigned error is that "the court erred in giving judgment against appellant, for in so doing he evidently held the statute of limitations had run against the action." There is not anything in the record disclosing the reason why the court found for and entered judgment in favor of the defendants. While not passing upon the question whether the court erred in its decision upon the point as to the statute of limitations—if it made one—we may and do say that, even if it erroneously found that the statute had run, it would not follow that the judgment should be reversed, for the reason that the court may have found that the evidence of the plaintiff did not make out a *prima facie* case on the merits.

Under the doctrine of implied findings which prevails in this state, it must be presumed that the court correctly found in favor of the defendants.

There not being any of the evidence in the record, we cannot say that the court erred in finding for the defendants.

Affirmed.

COOMBE ET AL., APPELLANTS, v. KNOX ET AL.,
RESPONDENTS.

(No. 1,572.)

(Submitted May 13, 1903. Decided May 18, 1903.)

Attorney's Lien—Foreclosure—Pleading

In an action against McDonald, Knox, Maloney and Cobban to establish and enforce an attorney's lien the complaint alleged: that plaintiffs were employed by McDonald, as her attorneys, to prosecute an action on her behalf against Knox in the district court; that they performed the services re-

quired of them, and obtained a judgment in their client's favor for \$331.65; that such action had been tried in a justice's court, and from a judgment rendered therein in favor of their client an appeal had been taken to the district court by the losing party; that the ordinary undertaking had been given with the defendants Maloney and Cobban as sureties thereon; that for the services rendered by plaintiffs, \$300 was a reasonable attorney's fee; that no part thereof had been paid; and that no part of the judgment obtained by McDonald in the district court had ever been paid. To this complaint separate demurrers were interposed by the defendants, the grounds of which were: (1) Misjoinder of parties; (2) misjoinder of causes of action; and (3) failure to state facts sufficient to constitute a cause of action. *Held*, that the demurrers were not well taken.

Appeal from District Court, Silver Bow County; John Lindsay, Judge.

ACTION by R. Coombe and O. M. Hall against Mary McDonald, Jessie C. Knox, J. H. Maloney and R. M. Cobban. The defendant McDonald made default. From a judgment for costs entered in favor of defendants Knox, Maloney and Cobban, plaintiffs appeal. Reversed.

Mr. O. M. Hall, for Appellants.

Mr. C. D. Tillinghast, and *Mr. John N. Kirk*, for Respondents.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was brought by the appellants, who were plaintiffs below, to establish and enforce an attorney's lien. The complaint alleges that the plaintiffs were employed by one Mary McDonald as her attorneys to prosecute a cause of action on her behalf against Jessie C. Knox, in the district court of Silver Bow county; that they performed the services required of them and obtained a judgment in their client's favor for \$331.65; that such action had been commenced and tried in a justice of the peace court, and from a judgment rendered therein in favor of McDonald an appeal had been taken to the district court by the losing party; and that the ordinary under-

taking on appeal had been given, with the defendants Maloney and Cobban as sureties thereon. A copy of such undertaking is attached to and made a part of the complaint, to only one paragraph of which it is necessary to make reference: "We do further, in consideration thereof and the premises, jointly and severally undertake and promise * * * that she (appellant) will pay any judgment and costs that may be recovered against her in said action in the district court, not exceeding the sum of \$300, to which amount we acknowledge ourselves jointly and severally bound.

"J. H. Maloney,
"R. M. Cobban."

The complaint then alleges that for the services rendered by these plaintiffs, \$300 is a reasonable attorney's fee; that no part of it has been paid; and that no part of the judgment obtained by McDonald against Knox in the district court has ever been paid. The defendant McDonald made default. To the complaint a separate demurrer was interposed by the defendant Knox, and a like separate demurrer by the defendants Maloney and Cobban. The grounds of the demurrers are: (1) Misjoinder of parties defendant; (2) misjoinder of causes of action; and (3) that the complaint does not state facts sufficient to constitute a cause of action. These demurrers were by the court sustained and judgment for costs entered in favor of the defendants Knox, Maloney and Cobban, from which judgment this appeal is prosecuted.

Section 430 of the Code of Civil Procedure provides: "The compensation of an attorney and counselor for his services is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision or judgment in his client's favor and the proceeds thereof in whose ever hands they may come; and cannot be affected by any settlement between the parties before or after judgment."

The complaint, then, in so far at least as any criticism is made upon it by respondents, does allege facts sufficient to show that the plaintiffs herein had a lien upon their client's cause of action in *McDonald v. Knox*, which lien attached to the judgment recovered by McDonald as soon as it was rendered.

The complaint also alleges that no part of the judgment has ever been paid and that its payment is secured by the appeal bond upon which Maloney and Cobban are sureties. It is not essential to the existence of the lien that the amount of the attorney fee should be definitely fixed. The amount due must be alleged either by stating a fixed sum or by averring the reasonable value of the services rendered, as is done in this instance. (4 Cyc. Law & Pro., 1022.) This is an equitable action, brought to foreclose a lien, and every person interested in the subject-matter of the controversy is a proper party to the proceedings. Mrs. Knox, the judgment debtor, was properly made a party and is in no position to complain, for the payment of money into court by her, sufficient to satisfy this lien would operate to discharge, *pro tanto*, her obligation to McDonald. The attorney seeking to enforce his lien may bring an independent action against his client or the adverse party, or both. (4 Cyc. Law & Pro., 1021, and cases cited.)

Are Maloney and Cobban proper parties defendant? The lien granted by the statute operates as an equitable assignment of so much of the judgment as will satisfy the lien, and, for the purpose of securing payment, subrogates the attorney to the right of his client to that extent. (4 Cyc. Law & Pro., 1005.) Any security, therefore, which the client has for the payment of his judgment, may be availed of for the benefit of the attorney. The appeal bond given by Knox, upon which Maloney and Cobban are sureties, was for the benefit of McDonald to secure the payment of her judgment; and to the extent which that judgment is by operation of law equitably assigned to her attorneys, is the security for its payment liable to enforcement by such attorneys. In *Clark v. Sullivan*, 3 N. D. 280, 55 N. W. 733, the same question was before the supreme court of

North Dakota, and it was there decided that the attorney's lien extends not only to the judgment recovered by his client, but attaches to any bond or undertaking given to secure payment of that judgment. To the same effect are the decisions in *Leighton v. Serveson*, 8 S. D. 350, 66 N. W. 938; *v. Lord*, 36 Oregon, 412, 59 Pac. 710; *Davidson v. Com'rs*, 26 Colo. 549, 59 Pac. 46; *Newbert v. Cus* 50 Me. 231, 79 Am. Dec. 612. There was no misjoinder of parties defendant. Neither was there any misjoinder of causes of action. In fact there is but one cause of action stated in the complaint, a cause of action upon the foreclosure of an attorney's lien, every sense analogous to the foreclosure of a mechanic's mortgage. In *Elliott v. Leopard Mng. Co.*, 52 Cal. 52, the supreme court of California had before it a like cause of action where the same relief was sought and where a demurrer was filed on the same grounds as those in the case at bar was interposed, and held that there was no misjoinder of causes of action or of parties defendant.

For the reasons stated the judgment is reversed and the cause remanded to the lower court with directions to overrule the demurrer.

Reversed and remanded.

IN RE WESTON.

RYAN, CONTESTANT, v. WESTON, CONTESTEE.

(No. 1,927.)

(Submitted March 19, 1903. Decided May 18, 1903.)

28	207
128	222
28	207
130	538

Constitution — Supreme Court — Jurisdiction — Original — Appellate — Supervisory Control — District Judges — Disqualification — Bias or Prejudice — Order Substituting One District Judge for Another.

1. The Act of the Eighth legislative assembly, entitled "An Act to provide for the designation and appointment of a district judge to temporarily hold court in another district than his own, and to perform the official duties of the district judge of such district, where such judge is biased or prejudiced or for any cause disqualified from performing the same" (Laws of 1903, Chapter 42), held to be unconstitutional.
2. Constitution, Article III, Section 29, providing that "the provisions of this constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise," is conclusive upon the legislature, and prevents the enactment of any law which has for its purpose the extension or limitation of the powers conferred by the constitution.
3. The power to issue, hear, and determine the six original writs enumerated (Constitution, Art. VIII, Sec. 3), marks the limit of the original jurisdiction of the supreme court.
4. Under Constitution, Article VIII, the ordinary appellate power of the supreme court is limited to a review of the decision of the lower court, and a judgment affirming, modifying or reversing such decision,—with the strictly ancillary power to issue, hear and determine such original and remedial writs as may be necessary or proper to the complete exercise of this appellate jurisdiction.
5. Under Constitution, Article VIII, Section 2, the power of supervisory control is lodged in the supreme court sitting as an organized judicial body, and such power operates only upon inferior courts; it cannot extend to or affect any other body or any individual or individuals.
6. In the absence of a statute declaring bias or prejudice on the part of a judge to be a disqualification, bias or prejudice does not constitute a disqualification.
7. Under Constitution, Article IV, Section 1, the legislature cannot impose upon the supreme court, or its justices, the performance of an act not judicial in its character but purely ministerial or executive.
8. *Quære*: Has the supreme court, under its power of supervisory control, power to control a lower court, by prohibiting the judge thereof from proceeding with the trial of a cause, if it were made manifest that he was for any reason incapable of giving either of the parties a fair trial?

ELECTION contest by Patrick V. Ryan against John Weston, in which contestant instituted an original proceeding in the

supreme court under Chapter 42, Laws of 1903, for the appointment of a district judge to temporarily hold court in the district in which the contest was commenced. Proceedings dismissed.

STATEMENT OF THE CASE.

This is an original proceeding instituted in this court by Patrick V. Ryan for the purpose of securing an order designating a judge of some district other than the Second judicial district, to try and determine the contested election case of *Ryan v. Weston*. The proceeding is taken under the provisions of an Act of the Eighth legislative assembly of Montana, designated as "Substitute for Senate Bill No. 71," entitled "An Act to provide for the designation and appointment of a district judge to temporarily hold court in another district than his own, and to perform the official duties of the district judge of such district where such judge is biased or prejudiced or for any cause disqualified from performing the same," which is as follows:

"Be it enacted by the Legislative Assembly of the state of Montana:

"Section 1. When a party to a civil action or proceeding pending in any district court of the state has reason or cause to believe that such party cannot obtain a fair and impartial trial or determination of such action or proceeding, or of any motion, or application therein made, by reason of the bias or prejudice arising from any cause, of the district judge presiding in the court, or any department thereof where such action, proceeding, motion or application is pending, or where such judge so presiding is, from any other cause, disqualified from acting therein, such party or his attorney may first request the judge of the district court wherein such action, proceeding, motion or application is pending, to sign a petition addressed to, and asking, the supreme court, without stating grounds therefor, to designate and appoint a judge of some other ju-

dicial district of this state to hear, try and determine such action, proceeding, motion or application, and if such petition be signed by the district judge to whom the same is presented the supreme court shall on presentation thereof make an order designating and appointing the judge of some judicial district of this state to hear, try and determine such action, proceeding, motion or application as in this Act provided; but if the district judge to whom such petition is presented refuses, or for the period of three days fails, to sign said petition, the party on whose behalf the same is presented may, by a petition verified by the affidavit of petitioner or his agent or attorney setting forth such bias or prejudice or other grounds of disqualification and the facts upon which the same is based, and the failure or refusal of the judge of the district court or department thereof wherein such action, proceeding, motion or application is pending to sign a petition for the appointment of another judge as hereinabove provided, petition the supreme court, or the justices thereof, to designate and appoint a district judge of some other judicial district of this state, to act in such cause; and the supreme court, or any two justices thereof, may upon a summary hearing of such petition in court or chambers, with any further showing which may be by the court or justices deemed proper, make an order designating and appointing the judge of any judicial district of the state other than that in which such action, proceeding motion or application is pending, to appear in the district in which such action, proceeding, motion or application is pending, at some proper and convenient time and preside at the trial of such action, or other matter mentioned in the order, and to determine the same, and to do any and all judicial acts necessary, proper and lawful in and about the adjudication and determination thereof, and in and about administering proper relief therein with the same force and effect as if done or ordered by the judge of the district wherein such matter is pending.

"Sec. 2. Upon such order being made and filed in the action or proceeding therein mentioned the judge or judges of the dis-

district court wherein such action or proceeding is pending shall not proceed further in such action or proceeding or try or decide the same, nor do any other judicial act therein except upon consent of the parties thereto or their attorneys in writing.

"Sec. 3. The district judge designated and appointed in the order of the supreme court in the cases in this Act provided shall have full power and authority to preside at the trial of and to try and decide such action, proceeding, motion or application mentioned in such order and to do all acts and things lawful and proper to be done, in court or at chambers, in and about the trial, adjudication, decision and granting and administering all proper and lawful remedies and relief and enforcing the same in said action, proceeding, motion or application mentioned in such order of the supreme court as could be done by a judge of the judicial district wherein such action, proceeding, motion or application is pending; and upon receiving a copy of such order of the supreme court it shall be the duty of the district judge therein designated and appointed, to appear at the county seat of the county in which such action, proceeding, motion or application is pending, at some proper and convenient time and try the same, but if from any cause he should fail so to do, the supreme court may by its order designate another district judge to do the same, who shall be vested with like powers in such action, proceeding, motion or application: provided, that neither party shall petition the supreme court more than once in the same action or proceeding to designate and appoint another judge to act therein under the provisions of this Act, except in cases where the district judge previously appointed to act therein has failed from any cause so to do.

"Sec. 4. A district judge designated and appointed to hold court in another district pursuant to the provisions of this Act shall be paid his actual expenses, to be allowed by the state board of examiners and paid in the same manner as his regular salary.

"Sec. 5. This Act shall be in full force and effect from and after its passage and approval." (Chapter 42, Laws of 1903.)

Upon the filing of the petition this court, on its own motion, directed an order to be issued to the district judge in whose department the case of *Ryan v. Weston* is pending, and to the contestee, to show cause, if any they had, why the relief prayed for should not be granted, and directed a hearing upon the return thereof. At the hearing counsel for the district judge and for the contestee filed a motion to dismiss the proceedings, upon the ground that substitute for Senate Bill No. 71 is unconstitutional, and that this court has no jurisdiction to entertain the petition or to grant the relief prayed for. Upon this motion the questions involved were argued and submitted for determination.

Mr. W. E. Carroll, and *Mr. E. N. Harwood*, for Contestant.

Mr. Lewis P. Forestell, *Messrs. Toole & Bach*, and *Messrs. Carpenter & Carpenter*, for Contestee.

MR. JUSTICE HOLLOWAY, after stating the case, delivered the opinion of the court.

"The source of all power vested in the supreme court is the constitution of the state, and in it must be found the measure of jurisdiction." The foregoing succinct statement taken from the brief of the petitioner in the proceedings No. 1,928 (*In re Application of the Boston & Montana Consol. Copper & Silver Min. Co.*, 28 Mont. 221, 72 Pac. 1103), correctly lays the foundation for determination of the question involved in this controversy. The general rule, repeatedly affirmed and now well understood, that the constitution of the United States represents a grant of power by the several states and the inhabitants thereof to the general government, while the constitutions of the several states operate upon the lawmaking branches of those governments as limitations of authority, must be understood and considered in this connection with the qualification which our own state constitution has attached, that "the provisions of this constitution are mandatory and prohibitory, unless by express

words they are declared to be otherwise." (Section 29, Article III, Constitution of Montana.) This declaration can have but one meaning—that, with reference to these subjects upon which the constitution assumes to speak, its declarations shall be conclusive upon the legislature, and shall prevent the enactment of any law which has for its purpose the extension or limitation of the powers which they confer. An examination of our constitution discloses an attempt on the part of its framers to define the jurisdiction of this court, and such definition must be accepted as a final declaration upon that subject: (1) The supreme court shall have appellate jurisdiction only, except as otherwise provided by this constitution (Section 2, Article VIII), and shall have power to issue, hear, and determine such original and remedial writs as may be necessary or proper to the complete exercise of its appellate jurisdiction (Section 3, Article VIII). (2) It shall have general supervisory control over all inferior courts, under such regulations and limitations as may be prescribed by law. (Section 2, Article VIII.) (3) It shall have discretionary power to issue, hear and determine writs of *habeas corpus*, *mandamus*, *quo warranto*, *certiorari*, prohibition, and injunction. (Section 3, Article VIII.)

For the purpose of this discussion, these are transposed, and will be considered in this order: (1) original jurisdiction; (2) appellate jurisdiction; and (3) supervisory jurisdiction.

1. ORIGINAL JURISDICTION.

The power to issue, hear, and determine the six original writs enumerated above marks the limit of the original jurisdiction of this court. The scope and purpose of these writs are too well defined and understood to require particular attention. They are essentially prerogative writs. They were so denominated at common law, and issued only on behalf of the state; and, if used for private remedy, it was only upon leave granted, and then in the name of the state. They were never presumed to be ordinary writs applicable to private controversies, and issuable

as a matter of course. (*Attorney General v. Railroad Companies*, 35 Wis. 425; *State ex rel. Clarke v. Moran*, 24 Mont. 433, 63 Pac. 390; *State ex rel. Anaconda Copper Mining Co. et al. v. Dist. Court*, 25 Mont. 521, 65 Pac. 1020.) It can hardly be seriously contended that the exercise of the appointing power sought to be conferred by the Act under consideration would fall within the purview of any one of these writs, or within the original jurisdiction of this court. Indeed, a direction of this court designating a nonresident judge to sit in lieu of the one complained of would not be a writ at all, but simply an order which might be signed by the justices themselves, and which would not even require the seal of the court to authenticate it. It may be true that, upon the failure of the resident judge to sign a petition for his own displacement, the original jurisdiction of this court is sought to be invoked, or, in other words, in that instance the proceedings instituted in the supreme court partake of the nature of original proceedings; but, if so, the power of this court to act would have to be lodged somewhere, and be capable of definite determination. We must decline to employ any one of the original writs mentioned above for the purposes of this Act. The fact that the federal courts and certain state courts of last resort do make use of the writ of *mandamus* or *certiorari* for the purpose of general supervision of inferior courts will not justify us in deflecting the purpose of those writs from well-defined channels, especially in view of the express grant of supervisory control to this court in plain and unmistakable terms, which, in the absence of legislative enactment defining the mode of proceeding, may be exercised by means of such writ or process as for that purpose may be invented.

2. APPELLATE JURISDICTION.

Upon appeal to this court in the ordinary course of litigation, the full measure of relief which may be granted is a review of the decision of the lower court and a judgment of this court

affirming, modifying, or reversing the decision. Further than this we cannot go. (*State ex rel. Whiteside v. District Court*, 24 Mont. 539, 63 Pac. 395.) The Act in question, however, does not purport to invoke the appellate power of the supreme court. Under its provisions every litigant is given two opportunities to secure a nonresident judge to try his cause: First, upon the petition of the resident judge himself; or, second, upon the petition of the litigant, addressed directly to this court, in case the resident judge refuses to sign the petition. In the first instance the supreme court has nothing to do—no discretion to exercise, no deliberation to indulge, no judgment to form—but must make the appointment. In so doing we are not reviewing the action of the district judge, but merely acting on his suggestion or at his dictation. In the event the resident judge refuses or neglects to sign the petition, the only remedy sought by resort to this court is to have the appointment made without reference to his wishes. The Act does not assume to require the resident judge to sign the petition. He may do so or not, but upon his refusal no error can be predicated; and, if no error is charged, no review can be had. There can be no affirmance, modification, or reversal of the order of the resident judge, when none has been made. If the Act required him to do something, his refusal might be overcome by appropriate action, but a matter which is left purely to his discretion may not be controlled by the ordinary appellate power of this court. As an incident of and ancillary to the ordinary appellate jurisdiction of the supreme court, the power has been conferred to issue, hear, and determine such original and remedial writs as may be necessary or proper to the complete exercise of this appellate jurisdiction. But this power is only auxiliary. An action must be in this court on appeal, or an appeal sought to be perfected, before this ancillary or subsidiary jurisdiction can be moved into activity for any purpose whatever, and then only in aid of such appellate jurisdiction. The very grant of this power implies, first, that an appeal has been or is sought to be perfected in this court; second, that the ordinary processes of

appeal are inadequate; and, third, that some writ known to the common law, or such as this court may invent, will complete or fully supplement the appellate power.

3. SUPERVISORY JURISDICTION.

(a) "The supreme court shall have a general supervisory control. * * *" (Constitution, Sec. 2, Art. VIII.) By express terms the constitution has lodged this jurisdiction in the supreme court, sitting as an organized judicial body; and, those terms being both mandatory and prohibitory, that power of general supervision cannot be conferred upon any other body or upon any individual or individuals. It cannot be added to, subtracted from, or taken away altogether. Tested by this rule, the invalidity of the Act is too apparent for comment. It assumes to vest in two of the justices of this court, sitting in chambers, full power and authority to carry its provisions into effect, and to do any and all things which this court could do in the premises. The distinction between a court and the judge or justices thereof is so well defined and so distinctly marked in the jurisprudence of this country that it calls for no further comment here. If the objection now under consideration was the only one urged against the measure, we might eliminate the provisions conferring the appointing power upon the justices at chambers, and permit the remainder of the Act to stand.

(b) "The supreme court shall have general supervisory control over all *inferior courts*. * * *" (Constitution, Sec. 2, Art. VIII.) The supervisory power of this court operates only upon *inferior courts*, not upon persons; and, under the rule of interpretation provided by the constitution itself, it cannot extend to or affect any other body or any individual or individuals. It is manifest from the terms employed that the Act does not purport to affect the district court—does not intend to disarrange the judicial machinery or change the place of trial, which can only be effected by a change of venue—but seeks merely to change the personnel of the presiding officer. The

Act is aimed at the individual, not at the constituent part of the lower court; for a change of judge would not change the court. For all judicial purposes it would remain the same after the change as before. (*Hedrick v. Hedrick*, 28 Ind. 291.)

(c) The supervisory power granted to this court is a co-ordinate power, and, as with its original and appellate jurisdiction, so with this. The power thus conferred will only be exercised after consideration, deliberation, and a judicial determination of the merits of the controversy with reference to which it is sought to be invoked. It cannot be appealed to and a remedy had under it as a matter of course. Commenting upon the sweep of this power, this court, in *State ex rel. Whiteside v. District Court*, 24 Mont. 562, 63 Pac. 400, said: "As the appellate jurisdiction was granted for the purpose of revision and correction, and the original jurisdiction under these writs was granted to enable us to render such relief as is appropriate under them, so the supervisory power was granted to meet emergencies to which those other powers and instrumentalities are not commensurate. It is independent of both, and was designed to infringe upon the functions of neither. It has its own appropriate functions, and, without undertaking to define particularly what these functions are, we think one of them is to enable this court to control the course of litigation in the inferior courts where those courts are proceeding within their jurisdiction, but by a mistake of law, or wilful disregard of it, are doing a gross injustice, and there is no appeal, or the remedy by appeal is inadequate. Under such circumstances, the case being exigent, no relief could be granted under the other powers of this court, and a denial of a speedy remedy would be tantamount to a denial of justice. Cases may arise also where some relief could be granted under some one of the other original writs named, but such relief would not be complete and adequate because of some error which could not be corrected by means of the limited functions of the particular writ, while the supervisory power is unlimited in the means at our disposal for its appropriate exercise."

The terms "supervisory control" imply something to supervise as well as something to control, and the exercise of judicial discretion or judgment on the part of this court, while the Act under consideration does not provide for the one, nor permit the other. If the resident judge signs the petition to this court without stating any ground whatever, this court must appoint another judge to take his place, whether he be disqualified or not. No discretion is left to this court, and no judicial action is called for. The appointment must be made. If the resident judge refuses or neglects to sign the petition, the litigant himself may apply to this court upon a petition setting forth the allegations of bias or prejudice on the part of the resident judge, and upon a summary hearing this court may appoint another judge to take his place; and that, too, without notice to the accused judge or opposing party litigant, and without any hearing having been granted to either of them. The effect of such an appointment, though made summarily, is to declare the resident judge guilty of entertaining bias or prejudice to such an extent as to render the complaining litigant unable to secure a fair trial, and to make such bias or prejudice operate as a disqualification of the resident judge. This we may not do, for this is not a legislative body. Nowhere in this Act, by express terms or by any fair implication, can it be said that bias or prejudice on the part of the resident judge is declared to be a disqualification, and we know of no other statute to that effect; and, in the absence of such statutory declaration, bias or prejudice does not constitute a disqualification in this jurisdiction. This question was settled by this court in the early history of this state. (*In re Davis' Estate*, 11 Mont. 1, 27 Pac. 342.) In our judgment, the constitutional authority to entertain the petition or grant the relief prayed for must be apparent, and in the absence of such authority we cannot act.

In addition to there being no constitutional authority under which this court can proceed, the Act is in violation and directly contravenes the provisions of Section 12 of Article VIII of the Constitution, which are that "any judge of the district court

may hold court for any other district judge. * * *” This section of the constitution makes provision for the substitution of one judge for another, and must be held to be exclusive, at least until the authority vested in it has been exhausted. By analysis, we reach the result:

(1) The framers of our organic law saw fit to repose the power of substituting one district judge for another in the district judge himself, and upon his invitation any other district judge in the state may be called to take his place; and, if the invitation be accepted and acted upon, no authority can be found to deny such invited judge authority to proceed, and that, too, though he may reside in the same district as the one extending the invitation.

(2) It cannot be seriously contended that the purpose of the Act was to provide a mode of substitution in addition to the one prescribed by the constitution. This, clearly, cannot be done; but, if it could, such a result would lead to endless confusion. If, under the provisions of this legislation, the supreme court should assume to act, and should by order designate the judge of the Fifth judicial district of this state to proceed “at some proper and convenient time” to Silver Bow county and try the contested election case of *Ryan v. Weston*, and, immediately before this court made such order, the district judge in whose department that cause is now pending should invite one of the other judges of the Second judicial district to try the same, and his invitation should be accepted and acted upon, and the case tried and determined by such invited judge under express authority conferred by the constitution, which clothes such invited judge with all the power and authority of the one whom he supplants, the anomalous, not to say ridiculous, position of this court and the judge designated by it under this legislative enactment would be too palpable for discussion. The resulting confusion would be intolerable.

(3) Section 1 of the Act provides that, upon the failure or refusal of the district judge to sign the petition asking for his own displacement, the supreme court or any two justices at

chambers shall designate and appoint a judge "or any judicial district of this state other than that in which such action, proceeding, motion or application is pending, to appear * * * and preside at the trial of such action or other matter mentioned in the order and to determine the same." This provision emphasizes the fact that the judge appointed by this court must come from some district other than the one in which the cause is pending, and in that respect contravenes the provisions of Section 12, above, which provides that any district judge may hold court for any other district judge, and shall do so when required by law; and that, too, whether he come from another or from the same district. When the constitution uses the terms "any district judge may hold court for any other district judge," it means what it says, and cannot be tortured into excluding one of the judges of the First judicial district or two of the judges of the Second.

Finally, the power sought to be conferred upon this court or two of its justices is not judicial in its character, but purely ministerial or executive, and invades another department of our state government, which may not be done. Section 1, Article IV, of the Constitution, provides: "The powers of the government of this state are divided into three distinct departments: The legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted." The orderly disposition of the business of the state requires the faithful observance of this constitutional mandate. "This court is placed by the constitution at the head of the judicial system of the state; from its judgments there is no appeal to any other state tribunal, and its determinations are binding upon the rest of the state judiciary. The legislature cannot interfere with its existence or supremacy; nor can that body alter the nature of its jurisdiction and duties." (*People v. Richmond*, 16 Colo. 274, 26 Pac. 929.)

However reluctant this court may be to declare unconstitutional any measure which has received the sanction of the legislative department of our state government, we have no right to hesitate to do so when the invalidity of the Act is apparent, when direct attack is made upon it, and we are called upon to determine the question.

Numerous other objections are urged against the validity or policy of the measure, but, under the views herein expressed, we deem it unnecessary to consider them.

The motion to dismiss the proceedings is sustained, and the proceedings are dismissed.

Dismissed.

MR. CHIEF JUSTICE BRANTLY: I concur in the result reached by MR. JUSTICE HOLLOWAY, but, speaking for myself, do not wish to authorize the inference from anything said in the opinion that this court might not, under its power of supervisory control, and independently of legislative action, upon proper application, prohibit a district judge from proceeding with the trial of a cause if it were made manifest that he was for any reason incapable of giving either of the parties a fair trial. Whether or not this court has such power is a question which is not presented upon this application. I do not wish to be understood as expressing any opinion as to whether this power does or does not exist, but do not think consideration of the question should be regarded as foreclosed.

MR. JUSTICE MILBURN: I concur in the opinion of MR. JUSTICE HOLLOWAY; and in the conclusion reached by him; but I wish to add that there should not be any inference drawn from the language of the opinion that, independently of the Act now declared invalid, this court has not any power to control a lower court, the judge of which is sitting in a cause in which he is biased and prejudiced. This question is still an open one, and as to it I do not express any opinion.

IN THE MATTER OF THE APPLICATION OF THE
BOSTON & MONTANA CONSOL. COPPER
& SILVER MINING CO.

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228 211

(No. 1,928.)

(Submitted March 27, 1903. Decided May 18, 1903.)

For Syllabus, see *In re Weston*, ante, page 207.

ORIGINAL proceeding in the supreme court, under Chapter 42, Laws of 1903. Proceedings dismissed.

Mr. A. J. Shores, Mr. C. F. Kelley, and Messrs. Forbis & Evans, for Applicant.

Messrs. McHatton & Cotter, and Mr. Charles R. Leonard, for Respondents.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This is an original application to this court for an order designating a judge of some district other than the Second judicial district, to try and determine a certain cause pending therein, entitled *John McGinniss, Plaintiff v. Boston & Montana Consolidated Copper & Silver Mining Company, A. S. Bigelow, W. J. Ladd, Ed. C. Perkins, Edwin S. Grew, Joseph S. Bigelow, Leonard Lewisohn, Frank Klepetko, Amalgamated Copper Company, William Scallon and C. S. Batterman, Defendants*. The proceeding is taken under the provisions of an Act of the Eighth legislative assembly, designated as "Substitute for Senate Bill No. 71" [Chapter 42, Laws of 1903]. Upon the filing of the petition this court, on its own motion, ordered the plaintiff in the court below and the district judge in whose department the above cause is pending, to appear and show cause, if any they had, why the prayer of the petitioners should not be granted. Upon return of that order, counsel for the plaintiff and for the

district judge appeared and filed a motion to dismiss the proceedings upon the ground that the Act entitled "Substitute for Senate Bill No. 71" is unconstitutional, and that this court has no jurisdiction to entertain the petition or to grant the relief prayed for.

The facts in this case and the principle involved are identical with those in No. 1,927, entitled *Ryan v. Weston*, this day decided by this court, *ante*, 207, 72 Pac. 512, and upon the authority of that case the motion to dismiss is sustained and the proceeding dismissed.

Dismissed.

BAKER, RESPONDENT, v. BUTTE CITY WATER CO.,
APPELLANT.

(No. 1,568.)

(Submitted May 11, 1903. Decided May 20, 1903.)

Appeal — Review — Exceptions — Sufficiency — General Verdict—Special Findings — Inconsistency—Mining Claim —Location Notice—Evidence.

1. The supreme court cannot review the action of the court below in disregarding one of the special findings of the jury, where the party complaining does not specifically except thereto, but relies entirely upon an exception to the entry of judgment in favor of the other party.
2. A motion for judgment on the special findings is necessary; otherwise judgment will be entered on the general verdict as of course. In the absence of such motion in the trial court, no question concerning the right to such judgment can be raised on appeal.
3. Since the legislature has the right to provide rules for the marking of the boundaries of mining claims; for a record of such location; and what the recorded paper must contain,—the court may rightly exclude a location notice which fails to conform to the statute.

Appeal from District Court, Silver Bow County; John Lindsay, Judge.

28	222
30	132
28	222
33	62
34	279
28	222
35	333
28	222
40	584
40	585

ACTION by Ben Baker against the Butte City Water Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Messrs. Forbis & Evans, and *Mr. T. Bailey Lee*, for Appellant.

Mr. J. E. Healy, for Respondent.

MR. COMMISSIONER CLAYBERG prepared the opinion for the court.

This was an action in ejectment. Plaintiff alleged ownership of the premises in question, an illegal ouster therefrom by defendant, and an unlawful withholding of the possession thus acquired. The defendant denied plaintiff's ownership and that the ouster was illegal. It then affirmatively alleged "that at all times mentioned in plaintiff's complaint it was, and now is, the owner of, in possession of, and entitled to the possession of, the premises described in plaintiff's complaint." The question of the possession of the premises was not, therefore, an issue in the case.

Plaintiff testified without objection that defendant was in possession of the property, and the court instructed the jury as follows: "You are instructed in this case that the defendant is in possession of the premises in dispute, and it devolves upon the plaintiff to establish by a preponderance of the testimony his right to the possession of said premises by showing a valid location; and, if he fails in this respect, your verdict must be for the defendant."

At the close of the case the defendant requested four special interrogatories to be submitted for findings by the jury, of which that marked "No. 1" was as follows: "Was the defendant in this action, the Butte City Water Company, at the date of the commencement of this action, in possession of the ground in controversy?" The court complied with defendant's request in this regard. The record does not disclose whether plaintiff objected to the submission of this question, but the statement and

bill of exceptions were prepared and presented by defendant, and settled in his behalf, and could not properly contain plaintiff's objections or exceptions. (*Westheimer v. Goodkind*, 24 Mont. 90, 60 Pac. 813.) So that no presumption can be indulged as to whether plaintiff objected or consented to its submission. It is very clear that the court ought not to have submitted this question to the jury, because it was upon no issue involved in the case. The jury answered the question in the negative, and at the same time returned a general verdict for plaintiff, reciting therein "that the defendant withholds the possession of the same (the premises in dispute) from him." The record, therefore, discloses that the general verdict is inconsistent with this special finding. After the rendition of the verdict, plaintiff's attorney moved the court to enter judgment for plaintiff in accordance with the verdict of the jury, which motion, after a hearing, was sustained by the court. Defendant gave notice of intention to move for a new trial to be based upon "affidavits to be filed and upon a statement of the case to be prepared and settled." A statement on motion for a new trial and bill of exceptions was then settled. The record does not disclose whether a motion for a new trial was ever made or passed upon by the court. The appeal is taken from the judgment only.

The first error assigned is: "The court erred in setting aside finding No. 1." We cannot consider this alleged error for the following reasons:

First. The record does not disclose either a specific objection or exception to the action of the court in that regard. The question arose upon the hearing of plaintiff's motion for judgment upon the verdict. The court, in its ruling, stated: "This day motion to adopt findings and for judgment is argued by counsel, and by the court sustained, with the exception of finding No. 1, and judgment is ordered entered herein in accordance with said verdict." No objection to this action of the court in regard to the special finding is disclosed by the record. The only exception we find, which, by any possible construction, could be held

to refer to this action of the court, is stated as follows: "The court ordered judgment entered in favor of plaintiff and against defendant, to which action of the court, and the whole thereof, the defendant then and there duly excepted." In other words, counsel did not specifically object to the action of the court below in disregarding finding No. 1, and did not specifically except thereto, but relied entirely upon an exception to the entry of judgment. We do not think that this exception is sufficient to warrant consideration of the error assigned.

Second. The record does not disclose that the defendant sought in any way or manner to take advantage of the inconsistency of this finding No. 1 with the general verdict by motion for judgment upon such finding notwithstanding the general verdict. We do not believe that the court was bound, in the absence of any action on the part of defendant indicating any reliance upon this finding, to give the defendant any benefit arising from its existence. How can we say that, if defendant had made a motion for judgment upon this finding disregarding the general verdict, it would not have been granted? The following authorities hold directly, under statutes almost identical with ours, that, in order to have the question of inconsistency between a special finding and general verdict considered or passed upon by the appellate court, the party claiming such inconsistency must move the court below for judgment in his favor upon the special finding. (*Tritlipo v. Lacy*, 55 Ind. 287; *Toledo W. & W. R. W. Co. v. Craft*, 62 Ind. 395; *Bartlett v. P. C. & St. L. Ry. Co.*, 94 Ind. 281; *North Western Mut. Fire Ins. Co. v. Blankenship*, 94 Ind. 535, 48 Am. Rep. 185; *Carter & Bro. v. Mo. M. & L. Co.*, 6 Okl. 11, 41 Pac. 356.) The rule is stated by the text-writers as follows: "In order to obtain the advantage of special findings, a motion for a judgment upon them is necessary." (Thompson on Trials, Sec. 2696. "A motion for judgment on the special findings is necessary, as otherwise the judgment will be enforced as a matter of course upon the general verdict. In the absence of such a motion in the trial court, no question concerning the right to

such judgment can be raised on appeal." (20 Enc. Pl. & Pr. 375.) We agree with the doctrine here announced.

The next error specified is that "the court erred in admitting the plaintiff's location notice of the Key Note." We have examined the notice of location referred to, and the same seems to be regular in every respect, and in accordance with the provisions of the statute of this state. We, therefore, are of the opinion that the court correctly admitted it in evidence.

The next error alleged is that "the court erred in excluding the location of defendant's Keyno claim." We have examined this notice of location, and are satisfied that it does not conform to the statute of the state of Montana, or with the construction thereof by this court in the case of *Purdum v. Laddin*, 23 Mont. 387, 59 Pac. 153. The question as to the right of the legislature to provide rules for the marking of the boundaries of mining claims, and providing for a record of such location, and what the recorded paper must contain, has so long been recognized in this state, and has so many times been approved by this court, that it would be useless to enter again into any consideration of the questions so decided. We are satisfied, therefore, that the court did not err in excluding the location notice of the Keyno claim.

All other errors specified in the brief have been waived, either in the brief itself or by counsel for the appellant in his argument before the court.

Finding no error in the record, we advise that the judgment appealed from be affirmed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment appealed from is affirmed.

STATE EX REL HEINZE, RELATOR, v. DISTRICT COURT
OF THE SECOND JUDICIAL DISTRICT

ET AL., RESPONDENTS.

(No. 1,940.)

(Submitted April 23, 1903. Decided May 25, 1903.)

28	227
228	449
28	227
30	183
28	227
32	148
28	22
37	30

Appeal—Orders Appealable—Time for Appeal—Special Proceedings—Application for Receiver—Bill of Exceptions—Motions—New Trials.

1. Pending an action to settle a controversy as to the ownership of a mining claim, a receiver was appointed. On appeal the order of appointment was reversed. Thereafter, on January 17th, a hearing was had on the final report of the receiver, and at the conclusion thereof the court made an order fixing his compensation at a certain sum, and allowing him certain further sums for counsel and stenographer's fees. The order contained no provision as to who should be charged with these allowances. Two days later the receiver moved for an order requiring the plaintiff in the action to pay the allowances, and on January 31st the motion was granted, and an order entered in the form of a final judgment against the plaintiff for the amount thereof. *Held*, that the order of January 31st, and not that of January 17th, was the appealable order.
2. An application for the appointment of a receiver to work a mining claim pending a suit to settle a controversy as to the title thereto is not a "special proceeding," within the meaning of the Code of Civil Procedure, Section 1722, which, as amended by Acts 1890, page 146, provides that an appeal may be taken from a final judgment in an action or special proceeding within one year after the entry of judgment, but is a provisional remedy, which may only be had in an action, and cannot be made except as ancillary to and a step in the action itself.
3. Code of Civil Procedure, Section 1723, as amended by the Act of 1890, provides that an appeal may be taken from a final judgment in an action or special proceeding within one year after the entry of judgment; from an order appointing or refusing to appoint a receiver, or giving directions with respect to a receivership, or refusing to vacate an order appointing or affecting a receiver, within sixty days after entry thereof. Pending an action to settle a controversy as to the ownership of a mining claim, a receiver was appointed to work the property. On appeal the order of appointment was reversed. Afterwards an order was entered in the nature of a final judgment against the plaintiff in the action for the amount allowed the receiver for compensation, counsel fees, etc. *Held* to be a "final order in an action," and appealable within one year, and not an order "with respect to a receivership," appealable only for sixty days.
4. It is improper for the court to refuse to settle a bill of exceptions tendered in due time, for, while the appeal will lie whether the bill is made a part of the record or not, the papers and other evidence used on the hearing and the rulings on the objections cannot be of avail unless incorporated in a bill.

5. A motion for a new trial does not lie in a proceeding to settle the accounts of a receiver and to fix his compensation.
6. A motion which does not ask for a decision of an issue of fact arising upon formal pleadings is not the subject of a motion for new trial.
7. The court has no jurisdiction to settle a statement and bill of exceptions in support of a motion for a new trial in a proceeding where such motion does not lie.

ORIGINAL application by the state, on the relation of Arthur P. Heinze, for a writ of mandate directed to William Clancy, as judge of the Second judicial district court. Granted in part.

STATEMENT OF THE CASE.

Original application on the relation of Arthur P. Heinze for a writ of mandate to compel William Clancy, as judge of the Second judicial district court, to settle a bill of exceptions, and also a statement and bill of exceptions to be used on motion for a new trial. The facts out of which the controversy arises are the following: The relator with others, on August 12, 1899, brought an action in the district court of Silver Bow county against the Parrot Silver & Copper Mining Company. The purpose of the action was to settle a controversy as to the ownership of the Nipper lode mining claim, and in the meantime, and until the action could be determined, to restrain the defendant corporation from extracting and removing ore from the claim. This action was designated on the court calendar as cause No. 8,087. The relator did not allege ownership in the claim, but joined in the action as lessee of the interests owned by the other plaintiffs. While the action was pending, and on March 5, 1900, the relator, having himself been enjoined from mining the property in an action brought by the defendant corporation, made application in cause No. 8,087 for the appointment of a receiver to mine the property, and to hold the proceeds pending the action, purposing by this means, if possible, to protect his leasehold interest. Upon a hearing of this application the court appointed one Thomas McLaughlin receiver, and on May 16th the receiver entered into possession of the property, and operated it until, upon appeal to this court, the order of appoint-

ment was reversed. (*Hickey v. Parrot S. & C. Co.*, 25 Mont. 164, 64 Pac. 330.) When the cause was remanded to the district court, the receiver ceased operations under the order of appointment, and returned the possession of the property to the plaintiffs in the action. This he did on March 25, 1901. During his operations, covering a period of about ten months, he filed monthly accounts of his receipts and expenditures with the clerk of the court, but the relator did not at any time make any objection to them in any particular, though it appeared that the operations resulted in loss in the aggregate of \$10,342.29. The defendant corporation filed objections to each account. No order was made with reference to them, however, nor were any steps taken to have them settled and a formal discharge of the receiver obtained, until May 28, 1902. On that day, under an order of the court, upon a stipulation by the receiver and the defendant, these accounts were referred to William E. Carroll, Esq., as referee, for an adjustment of the disputed items. Thereafter the referee filed his report overruling all the objections. In the meantime the receiver filed his final report, in which he made a claim for compensation for himself and an allowance for counsel and stenographer's fees. On December 30th an order was made adopting the report of the referee. On January 8, 1903, a hearing was had upon the final report of the receiver and objections made thereto by the relator and his co-plaintiffs. The objections presented a controversy as to the amount of the compensation claimed by the receiver, as well as to compensation in any amount for the time subsequent to the date of the *remittitur* from this court, and as to any allowance for counsel and stenographer's fees covering the same period of time. Evidence as to the value of these services, both of the receiver and his counsel, was admitted over the objections of the relator, and his exceptions were noted. At the conclusion of the hearing, and on January 17th, the court made an order fixing the compensation of the receiver at \$16,000, less a payment already made to him of \$4,569, and allowing him \$10,000 for counsel fees covering the time after the annulment of the

order of appointment. An allowance of \$125 for stenographer's fees during the time was also made. The order contained no provision as to whether the plaintiffs or the defendant, or any of them, should be charged with these allowances. Thereupon, and within the time granted by the court for that purpose, counsel for relator prepared and served upon the receiver and the defendant his bill of exceptions. The court granted the receiver time within which to propose amendments, but none were proposed. On April 11, 1903, within the ten days allowed by the statute, and after service and upon due notice to the receiver and the defendant, the bill was presented to the judge for settlement. Upon objection by the receiver and the defendant, the judge, William Clancy, refused to settle the bill. The refusal was apparently based upon the theory that, if the order was appealable at all, the appeal should have been taken within sixty days from its entry, and, this time having already elapsed without an appeal, the settlement of the bill would be nugatory. On January 19th the receiver, through his counsel, and upon notice to the relator, moved the court for an order directing and requiring the relator to pay the allowances fixed in the order of January 17th. This motion was granted, and on January 31st the court entered an order in the form of a final judgment against the relator for the amount of the allowances, aggregating \$21,556, and directing execution to issue therefor. Within ten days from this date the relator served upon counsel for the receiver and for the defendant in cause 8,087 and filed with the clerk his notice of intention to move for a new trial, setting forth the statutory grounds of motion. Within the time allowed by the court, he served his bill of exceptions and statement in support of the motion upon the defendant and the receiver. These latter proposed no amendments. Thereupon, on April 15th, and within the ten days allowed after the time for amendments had expired, the bill and statement were, upon notice, presented to the judge for settlement. Objection was made to the settlements on the grounds, first, that the notice of intention had not been given in time; second, that a motion for a new trial was

not allowed by the statute; and, third, that, as the sixty days within which an appeal would lie from the order had already expired, and no appeal had been taken, a settlement of the bill and statement would serve no useful purpose. The judge sustained the objection, and declined to make the proper certificate of settlement.

Upon the filing of an affidavit setting forth these facts, an alternative writ was issued. The defendant judge appeared, and filed a demurrer raising a legal issue upon the sufficiency of the facts to warrant the relief sought. By consent an answer was also filed, but without waiving the legal issue presented by the demurrer, and, after argument, the matter was submitted.

Mr. James M. Denny, for Relator.

Messrs. Kirk & Clinton, and *Mr. H. L. Maury*, for Respondents.

MR. CHIEF JUSTICE BRANTLY, after stating the case, delivered the opinion of the court.

The answer presents no material issue of fact. We shall therefore consider the questions raised by the demurrer. These are: (1) Does an appeal lie from the order of January 31st as from a final judgment within one year from the date of entry, and, incidentally, was it the duty of the judge to settle the bill of exceptions presented on April 11th? (2) Under the provisions of the statute, does a motion for a new trial lie in a proceeding to settle the accounts of a receiver and to fix his compensation?

1. Section 1722 of the Code of Civil Procedure, as amended by the Act of 1899 (page 146, Sess. Laws 1899), provides: "An appeal may be taken to the supreme court from a district court, in the following cases: (1) From a final judgment entered in an action or special proceeding commenced in a district court. * * * (2) * * * From an order appointing or refusing to appoint a receiver, or giving directions with

respect to a receivership, or refusing to vacate an order appointing or affecting a receiver." Section 1723, as amended by the same Act, provides that "an appeal may be taken from a final judgment in an action or special proceeding * * * within one year after the entry of judgment," and that an appeal may be taken from any of the orders mentioned in Subdivision 2 of Section 1722 within sixty days after the same is entered in the minutes of the court or filed with the clerk.

Counsel for the defendant insist that, if the order for the review of which the bill of exceptions presented on April 11th is intended to furnish the basis is appealable at all, the appeal must be taken within sixty days from the date of it, and that, as this was not done, the presiding judge may not be compelled to settle the bill, because, the time for appeal having expired, the settlement of the bill would be a useless act. Counsel do not seem to have a clear notion as to whether the order of January 17th or that of January 31st is the one from which the appeal may be taken. The whole proceeding in the court below seems to have been conducted by piecemeal. We are of the opinion that the time within which an appeal may be taken began to run from the date of the final order in the proceeding, namely, from January 31st. It was only upon the entry of this order that the parties to the controversy could ascertain what their rights were as declared by the court. The proceedings had and orders made up to that time were intermediate, and, like the proceedings and orders upon the trial of an action, were merely the successive steps in the hearing which resulted in the final order or judgment determining the rights of the parties. Having reached this conclusion, it is necessary to decide whether this order is a final judgment within the meaning of the first subdivision of Section 1722, or whether it is an order "giving directions with respect to a receivership," and falls in the list of orders enumerated in the second subdivision of that section. If it falls within the first category, an appeal will lie within one year, under the first subdivision of Section 1723; otherwise the

second subdivision of the latter section applies, and the time for appeal has long since elapsed.

It will be noticed that the language of the first subdivision is "from a final judgment in an action or special proceeding," and not "from the final judgment," etc. Counsel for the relator argues that the application for a receiver was a special proceeding within the meaning of Sections 3470 and 3472 of the Code of Civil Procedure, and therefore that, the order being a final disposition of the receivership, the appeal comes within the provision touching special proceedings. We do not think this the correct view. The appointment of a receiver is a provisional remedy, which may be had in an action, and cannot be made except as ancillary to and a step in the action itself. The expression "special proceedings" has no reference to provisional remedies in actions at law or in equity, but to such proceedings as may be commenced independently of a pending action by petition or motion, upon notice, in order to obtain special relief. The provisions touching such proceedings are found in Part III (Sections 1930-3081) of the Code of Civil Procedure. Provisional remedies by way of injunction, receiverships, etc., are provided for in Part II (Sections 800-981) of that Code, and are incidental to formal actions brought in the ordinary way. We think, however, that the order falls clearly within the meaning of "a final judgment in an action," as used in that section, and is not an order "with respect to a receivership." The expression "with respect to a receivership" has reference to an active receiver engaged in the discharge of his duties and the orders made directing him therein. The right of appeal under this provision is granted to the parties, and not to the receiver. Nor does it, we think, have reference to controversies arising between the parties and the receiver as to his fees and allowances made by the court. The fees of the receiver may be allowed as costs, and taxed against the losing party upon the entry of final judgment in the action. (*State ex rel. Cornue v. Lindsay*, 24 Mont. 352, 61 Pac. 883; *Hutchinson v. Hampton*, 1 Mont. 39; *Ervin v. Collier*, 2 Mont. 605.) But this does not preclude the

court upon a discharge of the receiver before the conclusion of the action, as was the case here, from fixing his compensation, and adjudging payment thereof against the party at whose instance he was wrongfully appointed; otherwise the receiver, not having funds in his hands out of which his compensation could be paid, would be compelled to wait until the final determination of the action before his compensation could be allowed and paid. This view, we think, is sound upon principle. The order of January 31st was, in effect, a final judgment, making disposition of the branch of the case touching the receivership, and as such, we think, an appeal will lie therefrom at any time within one year from the date of its entry. "A final judgment is not necessarily the last one in an action. A judgment that is conclusive of any question in a case is final as to that question. The Code provides for an appeal from a final judgment, not from the final judgment in an action." (*Sharon v Sharon*, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709.) This case was an action for a divorce. Pending the action an order was made granting the plaintiff alimony and counsel fees. The defendant appealed. On motion to dismiss the appeal the court held the order appealable under the statute granting the right of appeal from a final judgment. The same conclusion was announced by this court, and the case of *Sharon v. Sharon* approved, in the case of *In re Finkelstein*, 13 Mont. 427, 34 Pac. 847, and in *State ex rel. Nixon v. District Court*, 14 Mont. 396, 40 Pac. 66. The order under consideration, being in form and effect a final judgment, is entirely analogous to an order awarding alimony and counsel fees in divorce cases. The following cases involving questions touching the character and appealability of similar orders are in point, and, we think, conclusive: *Tuttle v. Claffin*, 31 C. C. A. 419, 88 Fed. 122; *Daniels v. Daniels*, 9 Colo. 133, 10 Pac. 657; *Chandler v. Cushing-Young Shingle Co.*, 13 Wash. 89, 42 Pac. 549; *Hecht v. Hecht*, 28 Ark. 92; *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157; *Williams v. Morgan*, 111 U. S. 684, 4 Sup. Ct. 638, 28 L. Ed. 559; *Patterson v. Ward*, 6 N. Dak. 359, 71 N. W. 543; *Hovey v. McDonald*, 109 U. S. 150, 3 Sup. Ct. 136, 27 L. Ed. 888.

On this branch of the case it remains to consider only whether the court should have settled the bill of exceptions tendered on April 11th. The relator was present at the hearing, and had interposed objections to the admission of evidence. He had taken exceptions to adverse rulings upon his objections, as well as to other matters presented and determined against him. It appears from the facts stated in the affidavit that he proceeded within the time allowed by Section 1155 of the Code of Civil Procedure to have the bill settled, and made a part of the record, so as to make his exceptions available on appeal. This he had a right to do under the express provisions of this section as to any ruling adverse to him during the trial to which he reserved exceptions. The court should have settled the bill, and a refusal to do so was tantamount to a denial of the right of appeal, for, though the appeal would lie whether the bill was made a part of the record or not, the papers and other evidence used on the hearing and the rulings of the court upon the objections of the relator could not be of avail unless incorporated in a bill. (*Cornish v. Floyd-Jones*, 26 Mont. 153, 66 Pac. 838.)

2. Does a motion for a new trial lie in the proceeding under consideration? A new trial is a re-examination of an issue of fact. (Code of Civil Procedure, Sec. 1170.) The expression "issue of fact," used in its broader sense, would include every issue of fact, whether arising upon formal pleadings or upon a motion. As used here, however, it refers only to issues of fact raised by formal pleadings, as defined in Section 1033 of the Code of Civil Procedure. The definition here given clearly excludes issues arising upon affidavits or oral evidence used on motions. That this is so is made clear by Sections 1173, 1176, and other provisions touching new trials and appeals, all of which contemplate issues arising in actions. There is, therefore, no authority in the Code for a motion for a new trial of a motion. In such case, if a rehearing in the same court of the matters involved in the motion is desired, the proper practice is to apply for leave to renew the motion. If the purpose is to have it reviewed on appeal, it is sufficient to present to the su-

preme court the order, with a bill of exceptions incorporating the rulings of which complaint is made. Therefore a motion which does not ask for a decision of an issue of fact arising upon formal pleadings is not the subject of a motion for a new trial. These are the views of the supreme court of California upon identical provisions touching new trials. (*Harper v. Hildreth*, 99 Cal. 265, 33 Pac. 1103.) We adopt and approve them. It necessarily follows that the court was under no legal duty to settle the statement and bill of exceptions in support of the motion for a new trial. They were not intended to make a part of the record the objections, rulings of the court thereon, and exceptions reserved by the relator during the hearing under Section 1152 of the Code of Civil Procedure, as was the bill presented on April 11th, but were intended to preserve the same matters as the basis of a motion for a new trial under Section 1173. The course of procedure adopted could be pursued only under the provisions of the latter section. Therefore, as the motion did not lie, the proceeding to settle the statement and bill in support of the motion was a matter without the jurisdiction of the court, and the settlement was properly denied.

In so far as the application seeks a settlement of the statement and bill of exceptions in support of the motion for a new trial it is denied. The peremptory writ will issue, however, directing and requiring the district judge to settle and make a part of the record the bill of exceptions presented for settlement on April 11th.

Rehearing denied June 13, 1903.

MUTH ET AL., RESPONDENTS, v. GODDARD ET AL.,
APPELLANTS.

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(No. 1,914.)

(Submitted April 27, 1903. Decided May 25, 1903.)

*Power of Attorney—Construction—Authority of Attorney—
Trust Deed—Power of Sale—Right to Exercise—Effect of
Death of Grantor.*

1. An attorney in fact authorized to sell, convey, and mortgage the grantor's property may execute a trust deed conveying the grantor's individual property as security for the payment of a debt due from a firm of which he is a partner.
2. Where a person is liable on notes executed by a firm in payment of firm debts because a partner in the firm, a guaranty of the payment of the notes, executed by his attorney in fact, imposes no additional obligation.
3. Under Code of Civil Procedure, Section 3821, providing that a power of sale may be conferred on the mortgagee or any other person, to be exercised after a breach of the obligation for which the mortgage is security, and Code of Civil Procedure, Section 1293, declaring that, if a mortgage confers a power of sale after a breach, foreclosure may be had, an attorney in fact under a general power of attorney to sell, convey, and mortgage the grantor's property may secure the payment of his grantor's debt by executing a trust deed conveying the grantor's property, and authorizing the trustee or his successor in trust to sell the same in case of nonpayment of the indebtedness.
4. Whether an attorney in fact under a general power of attorney may execute a trust deed containing a stipulation for attorney's fees in case the deed is enforced by an action is immaterial where the trustee in the deed sells the property under a power of sale therein granted.
5. A trust deed, given as security for a debt, and containing a stipulation authorizing the trustee to sell the property after default, authorizes the trustee to exercise the power after the grantor's death; it being a power coupled with an interest, and therefore not revoked by the grantor's death.
6. Where a trust deed, given as security for a debt, conveys to him the legal title to the property therein described, and authorizes him to sell the same after default, the death of the grantor does not affect the trustee's right to exercise the power of sale.
7. Under Code of Civil Procedure, Section 2603, authorizing the foreclosure of mortgages though the mortgagor is dead, a trustee in a trust deed given as security for the payment of a debt, and authorizing him to sell the property after default, may, after the death of the grantor, exercise the power of sale without reference to the administration of the grantor's estate.

*Appeal from District Court, Lewis and Clarke County;
J. M. Clements, Judge.*

SUIT by William Muth, as administrator of the estate of Albert G. Clarke, deceased, and others, against L. A. Goddard and others, to restrain defendants from selling lands described in a trust deed under the power of sale therein granted. From an order granting the injunction, defendants appeal. Reversed.

STATEMENT OF THE CASE.

On the tenth day of October, 1890, Albert G. Clarke, Sr., was about to leave the state of Montana, to be absent during the winter, and on that day he executed to his son, Charles A. Clarke, the following power of attorney:

"Know all men by these presents, that I, Albert G. Clarke, Sr., of Helena, Lewis and Clarke County, Montana, have made, constituted and appointed and by these presents do make, constitute and appoint Charles A. Clarke, of said city, county and state aforesaid, my true and lawful attorney for me and in my name, place and stead, and for my use and benefit to ask, demand, sue for, recover, collect and receive, all such sums of money, debts due, accounts, interest, dividends, annuities and demands whatsoever as are now or shall hereafter become due, owing, payable or belonging to me, and have, use and take all lawful ways and means in my name or otherwise for the recovery thereof by attachment, arrest, distress or otherwise, and to compromise and agree for the same and acquittances or other sufficient discharges of the same for me and in my name to make, seal and deliver; to grant, contract, agree for, purchase, receive and take, lands, tenements and hereditaments, and to accept the seisin and possession of all lands and all debts and other assurances in the law therefor, and to lease, let, demise, bargain, sell, remise, release, convey, mortgage and hypothecate lands tenements, hereditaments upon such terms and conditions and under such covenants as he shall see fit, also to bargain and agree for, buy, sell, mortgage, hypothecate and in any and every way and manner deal in and with goods, wares and merchandise, choses in action, and other property in possession

or in action, and to make, do and transact all and every kind of business of what nature and kind soever, and also for me, and in my name and as my act and deed to sign, seal, execute and deliver and acknowledge such deeds, leases and assignments of leases, covenants, indentures, agreements, mortgages, hypothecations, bills of lading, bills, bonds, notes, receipts, evidences of debt, releases and satisfactions of mortgage, judgments and other debts and such other instruments in writing of whatever kind and nature as may be necessary or proper in the premises; giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in or about the premises, as fully to all intents and purposes as I might or could do if personally present, hereby ratifying and confirming all that my said attorney shall lawfully do or cause to be done by virtue of these presents."

Albert G. Clarke, Sr., never revoked this power, and it ceased to be operative only at his death. In November, 1899, Mr. Clarke, Sr., lay in his last sickness. For quite a long time he had been a member of the firm of Raleigh & Clarke. This firm was then, November, 1899, owing about \$35,000, about \$23,000 of which sum was due the Union Bank & Trust Company, of which George L. Ramsey was cashier. The firm of Raleigh & Clarke was unable to pay the bank anything upon this indebtedness, and Ramsey notified W. B. Raleigh, who, with Albert G. Clarke, Sr., composed the firm, "that, unless the matter was fixed up at once, he would attach Mr. Clarke," to which Raleigh replied that he (Raleigh) had made every effort, but was at the end of his resources. Raleigh then sent for Charles A. Clarke, and acquainted him with the situation. In the meantime the power of attorney was placed of record. Then followed a series of negotiations extending over a number of days. The result was that Raleigh turned over all his property to Albert G. Clarke, Sr. As he said, "I turned over everything that I had; the interest in Raleigh & Clarke and everything; made a clean sweep." He also, in the name of

Raleigh & Clarke, executed to the Union Bank & Trust Company seven notes for the sum of \$5,000 each. These notes represented the money already due the bank, and cash in hand which the bank advanced to pay the other creditors of the firm. Charles A. Clarke then, assuming to act under his power of attorney, indorsed the notes as follows: "For value received, I hereby guarantee the payment of the within notes at maturity, or at any time thereafter, with interest as specified, until paid, waiving demand, notice of nonpayment, and protest. A. G. Clarke, by Charles A. Clarke, His Attorney in Fact." And, likewise acting as his father's attorney in fact, Charles A. Clarke thereupon executed to John H. Tucker, as trustee, and party of the second part, and the Union Bank & Trust Company, party of the third part, a trust deed whereby he purported to convey certain of his father's real estate for the purpose of securing the payment of the seven promissory notes aforesaid. In this deed of trust it was stated that the grantor "has granted, bargained, sold and conveyed, and does by these presents grant, bargain, sell, convey, and confirm, unto the said party of the second part, with full power of substitution to his successors in trust, and assigns, forever, the following described tracts or parcels of land," etc. It was provided in the trust deed that in case of a default in the conditions thereof "the grantor herein does fully empower said trustee, original or substituted, his successors or assigns, and it is hereby made his special duty, at the request of the holders of the obligation secured hereby at any time made after default, as aforesaid, to take such steps as may be necessary for the collection of said debt, principal and interest, and to collect and sue for any rents due or to become due on said premises, and without process of law to enter upon and take possession of or let said premises, and either before or after said entry, when the trustee, his successors or assigns see fit, to sell the property herein conveyed, or any part thereof, together or in parcels, at public auction, for cash or on credit, at a place, time, and after the advertisement by him given, substantially conforming to and

as required by law in the cases of sales on execution at the time of the sale, and to execute and deliver to the purchaser or purchasers thereof good and sufficient deed or deeds in fee simple for the same, which shall vest the complete and unincumbered title of the said property, and be a bar against the grantor herein, his heirs or assigns, and all persons claiming under them or any of them, of all right, interest, or claim in or to said property and all parts thereof. * * * In the trust deed it was provided that an attorney's fee of five per cent. on the amount of the principal recovered should be a lien upon the property, and be taxed and collected as are other costs, in case the conditions of the indenture be enforced by an action in court.

All these negotiations were completed on December 16, 1899. On December 23 following Albert G. Clarke, Sr., died. In due time the seven notes were presented in the form of a claim against the estate of Albert G. Clarke, deceased, and allowed. Thereafter the said notes and trust deed were assigned to one L. A. Goddard. Some time after the maturity of the notes, Goddard, through his attorneys, Cullen, Day & Cullen, commenced to execute the power of sale contained in the trust deed. Thereupon William Muth, as administrator of the estate of Albert G. Clarke, deceased, William H. Clarke, and Albert G. Clarke, Jr. (the two Clarkes claiming to be entitled to the whole of the residue of the said estate to the exclusion of their brother Charles A. Clarke), as plaintiffs, commenced this action against the said L. A. Goddard, Cullen, Day & Cullen, and Charles A. Clarke, as defendants, to enjoin the defendants from selling the lands described in the trust deed under the power of sale, etc. Upon the filing of the complaint a temporary restraining order was issued, together with an order to show cause why the injunction should not be granted.

Upon the hearing of the order to show cause the court entered its order granting the injunction as prayed for. From this order the defendants appeal.

Messrs. Cullen, Day & Cullen, for Appellants.

The power of attorney was broad and comprehensive enough to authorize C. A. Clarke to execute the deed of trust in question. (*Barr v. Schroeder*, 32 Cal. 618; *Wood v. McCaine*, (Ala.), 42 Am. Dec. 613; *Mechem on Agency*, 1st Ed. Sec. 6, 304, 391; 18 Am. & Eng. Ency. Law, 1st Ed. p. 873; *Story on Agency*, Secs. 61, 58, 59, 74; *Marr v. Given* (Me.), 39 Am. Dec. 600; *Posner v. Bayless*, 59 Md. 56; *Reinick v. Wheeler*, 4 McCrary, 119; *Carson v. Smith* (Minn.), 77 Am. Dec. 539; *Burnett v. Boyd*, 60 Miss. 627; 1 Am. & Eng. Ency. Law, 2d Ed., 1902; *Wimberly v. Windham*, 16 So. 23; *Lamy v. Burr* (Mo.), 88 Am. Dec. 135; *Heard v. Pierce*, 54 Am. Dec. 757; *Benjamin v. Benjamin*, 39 Am. Dec. 384; *Percy v. Hedrick*, 98 Am. Dec. 774; *Merchants' Bank v. Bank*, 44 Am. Dec. 665; *Foster v. Smith*, 88 Am. Dec. 604; Civil Code, Secs. 3250, 1941.)

Messrs. Walsh & Newman, and Messrs. Toole & Bach, for Respondents.

Under the power of attorney, C. A. Clarke did not have authority to guarantee the payment of the notes of the firm of Raleigh & Clarke, and to execute the mortgage or deed of trust to secure that guaranty. (*Nipple v. Hammond*, 4 Colo. 211; *Wolfley v. Rising*, 8 Kan. 278; *Rossiter v. Rossiter*, 8 Wend. 495; *Batty v. Carswell*, 2 Johns. 48; *Roundtree v. Davidson*, 18 N. W. 518; *Claflin v. C. J. Works*, 11 S. E. 721; *Reynolds v. Terrel*, 86 Ill. 576; *N. Y. Iron Mine v. Bank*, 39 Mich. 644; *Gouldy v. Metcalf*, 12 S. W. 830; *Malloye v. Conbrough*, 31 Pac. 622; *Reinhart on Agency*, Secs. 197-201; *Bank v. Hope Mining Co.*, 3 Mont. 146; 1 *Parsons on Notes and Bills*, 107; *Stainback v. Read*, 11 Gratt. 281; *Little Rock v. State Bank*, 3 Ark. 227; *Story on Agency*, 7th Ed., Par. 165; *Tate v. Evans*, 7 Mo. 419; *Mechanics' Bank v. Schaumberg*, 38 Mo. 228; *Farmington S. B. v. Buzzell*, 61 N. H. 612; *Gulick v. Grover*, 33 N. J. Law, 463; *Cuyler v. Hastings*, 5 Hun. 559; *King v. Sparks*, 77 Ga. 285; *Hutton v. Towns*, 6 Leigh, 47;

Wallace v. Bank of Mobile, 1 Ala. (N. S.) 565; *Kingsley v. Bank*, 3 Yerger, 106; *Nichol v. Green*, Peck's Rept. 227; *Atwood v. Munnings*, 7 B. & Cres. 278; 1 Am. & Eng. Ency. Law, 2d. Ed., p. 1000; Civil Code, Secs. 3197, 2213; *In re Kern's Estate*, 35 Atl. 231; *Witz v. Gray*, 20 S. E. 1019; *Bohart v. Oberne*, 13 Pac. 392; *Essick v. Buckwalter*, 16 Atl. 849; *Mechem on Agency*, Sec. 274; *Dodge v. Hopkins*, 14 Wis. 685; *Gilbert v. Howe*, 47 N. W. 643; *Penfold v. Warner*, 55 N. W. 680; *Sullivan v. Miller*, 24 S. W. 819; *Johnston v. Wright*, 6 Cal. 373; *Frost v. Erath Cattle Co.*, 17 S. W. 52; *Horne v. Ingraham*, 16 N. E. 868; *Ferreira v. DePew*, 17 How. Pr. 418; *Brandt on Sureties & Guaranty*, Par. 20; *Bryan v. Berry*, 6 Cal. 394; *Durham v. Oddie*, 14 Am. Dec. 190; *Coulter v. Portland Trust Co.*, 26 Pac. 565; *Mora v. Murphy*, 23 Pac. 63; *Bates on Partnership*, Par. 158, 159; *Campbell v. Hastings*, 29 Ark. 512.)

A power of sale of mortgaged premises on default, inserted in a mortgage, based on a valuable consideration, cannot be revoked by any act or deed of the mortgagor; but is revoked or ceases the instant of his death, and cannot thereafter be executed. (Kerr, Supplement to Wiltse on Foreclosure of Mortgages, p. 1190; *Johnson v. Johnson*, 27 S. C. 309, 3 S. E. 606; *Lathrop v. Brown*, 15 Ga. 312; *Yates v. Prior*, 11 Ark. 58; *Jones on Mortgages*, Sec. 1794; *Wilkins v. McGee*, 13 S. E. 84; *Locket v. Hill*, Federal Cases, 8443.)

Foreclosure under a power of sale is inconsistent with the probate law. (Code of Civil Procedure, Secs. 2603, 2610, 2701; *Robertson v. Paul*, 16 Tex. 472; *McLane v. Paschal*, 47 Tex. 369; *Black v. Rockman*, 50 Tex. 94; *Abney v. Pope*, 52 Tex. 228; *Rogers v. Watson*, 17 S. W. 29; *Williams v. Washington*, 19 S. E. 1.)

The alleged trust deed provides fees for the trustee and attorney. This is beyond the scope of power under the power of attorney. (*Pac. Rolling Mills Co. v. Dayton, etc. Ry. Co.*, 5 Fed. 852; Code of Civil Procedure, Secs. 3150, 3146; *Fitzgerald v. Hansen*, 16 Mont. 474.)

MR. COMMISSIONER CALLAWAY prepared the statement of the case and the opinion for the court.

The following questions have been presented and argued by counsel: (1) Was Charles A. Clarke authorized by the power of attorney to execute the trust deed conveying his principal's individual property to secure the notes of the firm? And herein, did he have the authority to include in the trust deed a power of sale, and a provision for an attorney's fee in case of foreclosure? (2) Can the power of sale be executed now that Albert G. Clarke, Sr., is dead? We will treat these questions *seriatim*.

1. Authorities in great number have been cited by counsel in discussing the right of Charles A. Clarke to execute the trust deed under the power of attorney above set forth. We have examined them all, and also have made much independent research, in order to arrive at a correct solution of the propositions involved; but no case has been cited to or discovered by us, which, construing a power of attorney like the one in question, decides any similar point.

The instrument in question may be denominated an unrestricted general power of attorney. It will be noticed that the donor of the power placed his agent in a position to perform almost every act that may ordinarily arise in the transaction of business. Practically the only limitation it contains is to the effect that the attorney must act for the principal's use and benefit. It must be presumed that in giving this power the principal understood the full meaning of the words he employed, and undertook the risk to which he might be subjected in case his agent should carry the given power to its utmost limit. Being a business man, he must have known that the transactions of business do not always result in profit, and he therefore delegated to his agent, his son, very extensive powers, including the authority to pledge his credit and mortgage his property. Being about to leave the state of Montana for the winter, and knowing that he could not personally attend to his business affairs, he

confided in his son, and placed him in his stead. And the fiduciary relation then established continued until the donor died.

"Much of the business of the world is transacted by agents, or through agencies, representing their principals. It is a rule recognized by all the authorities that the acts of the agent, within the scope of his employment, are the acts of his principal, and the latter is bound by them. * * * The rules governing the construction of written instruments generally are resorted to in construing powers of attorney. (18 Am. & Eng. Enc. Law (1st Ed.) p. 871.) The obvious meaning of the terms used is not to be restricted or extended by implication in the absence of necessity. Another well supported rule relating to powers of attorney is that the intention of the parties, as ascertained by the language used, governs." (*White v. Ferguson*, 29 Ind. App. 144, 64 N. E. 49.)

"But it is said the power must be strictly construed. This may be true, but it does not require that it shall be so construed as to defeat the intention of the parties. Where the intention fairly appears from the language employed, that intention must control. A strained construction should never be given to defeat that intention, nor to embrace in the power what was not intended by the parties." (*Hemstreet v. Burdick*, 90 Ill. 444. And see *Marr v. Given*, 23 Me. 55, 39 Am. Dec. 600; *Carson v. Smith*, 5 Minn. 78, 77 Am. Dec. 539; *Lamy v. Burr*, 36 Mo. 85, 88 Am. Dec. 135; *Posner v. Bayless*, 59 Md. 56.)

"If the writing be open to two constructions, one of which would uphold while the other would overthrow the contract, the former is, where possible, to be chosen." (Mechem on Agency, Sec. 304.) And where third persons are concerned in cases of doubt, the general rule is that the words in the power are to be construed most strongly against the grantor. (Story on Agency, Sec. 74; Code of Civil Procedure, Sec. 3140.)

Under a general power of attorney, however, the agent cannot lawfully do any act unless it be for the principal's use and benefit. Thus he cannot lawfully act under it for the private bene-

fit of himself or third persons. Relying on this principle, counsel for plaintiffs contend that under the authority granted Charles A. Clarke he could not lawfully execute the trust deed; not for the reason that the power of attorney is insufficient in form to warrant his execution of it, but because in so doing he was securing a debt of the partnership, and thus was not acting for the use and benefit of his principal. We do not agree with counsel. Albert G. Clarke, Sr., as a member of the firm of Raleigh & Clarke, was liable to third persons for all the obligations of the partnership. (Civil Code, Secs. 1941, 3250.) Now, where the principal was liable for every dollar of the indebtedness of the partnership, and the partnership was unable to pay its debts, and the other partner had arrived at the end of his resources, what would have been the result if the attorney in fact had neglected to take any action whatsoever? Obviously, the result would have been that the creditors of the firm of Raleigh & Clarke would have instituted suits and levied attachments; merged their claims in judgments running against Albert G. Clarke, Sr., and W. B. Raleigh; issued and levied execution; sold all the firm property, and then a sufficient amount of Clarke's separate property to satisfy their demands. Indeed, the creditors might have levied upon the firm property and the individual property of Albert G. Clarke, Sr., simultaneously. Such action might have entailed great loss upon the solvent partner, Clarke; and it appears that this state of affairs inevitably would have resulted had it not been for the prompt action of Clarke's attorney in fact, and, under these circumstances, it seems clear that he acted for his principal's use and benefit. Whether any benefit accrued to W. B. Raleigh by reason of the action of Charles A. Clarke as attorney in fact, it is unnecessary to inquire. Doubtless, when Albert G. Clarke, Sr., paid the debts of the firm, it relieved W. B. Raleigh to some extent, but did it change the status of Clarke, Sr., when he was personally liable for the payment of all of these debts, irrespective of any benefit which might or might not incidentally accrue to W. B. Raleigh, his partner?

Upon this point plaintiffs say in their brief, "It is not pretended that Charles A. Clarke could, or attempted to, release Mr. Raleigh from the liabilities of the firm." The cases cited by plaintiff which they assert sustain their contention that the attorney in fact of a general partner cannot mortgage his principal's property to secure a partnership liability, even though the principal is solely responsible therefor, are not in point. No case has been cited by them which states the proposition that under a general power of attorney an agent may not mortgage his principal's property in order to save the principal from loss. They mainly rely upon the language found in Mechem on Agency, Sec. 307. We think counsel place a broader construction upon this section than was intended by the learned author. The section, read as an entirety, does not conflict with our views in this case, and an inspection of the cases cited in support of the text discloses this clearly.

There can be no doubt that the attorney in fact, unless especially authorized so to do, cannot bind the principal for the private benefit of the agent himself, or of third persons only. And while we purpose to discuss the applicability of the authorities cited in Mechem on Agency and by counsel to the question here involved, we suggest, in passing, this question: When Albert G. Clarke, Sr., was liable for all the debts of the firm of Raleigh & Clarke, and his individual property was about to be seized by attachment levied by creditors of the firm, did not the agent act in the sole, separate, and individual business of his principal when he took such action as prevented him from being thus greatly injured? And just here it must be remembered that Albert G. Clarke, Sr., was at this time the owner of all the property of Raleigh & Clarke. Raleigh, while still liable to the firm creditors, had transferred all his property to Clarke.

The first case cited by Mr. Mechem in support of Section 307, *supra*, and discussed by counsel, is *Stainback v. Read*, 11 Grat. 281, 62 Am. Dec. 648, in which it appears that the controversy arose over a bill of exchange which was not

drawn in the business of the principal, but in that of the attorney in fact exclusively. *Attwood v. Munnings*, 7 B. & C. 278, 4 Eng. Rul. Cases, 364, is a leading and much misquoted case. The defendant had given to his wife a power of attorney authorizing her to accept for him "such bill or bills of exchange as should be drawn or charged on him by his agents or correspondents as occasion should require." She accepted a bill of exchange which was not drawn by the principal's agent for that purpose; in other words, the drawer of the bill of exchange had no authority to draw it, nor was it within his ostensible authority. The court held that the wife, as attorney in fact, exceeded her power in accepting the bill, as the agent who drew it exceeded his in drawing it. *North River Bank v. Aymar*, 3 Hill, 262, was a case in which the attorney in fact executed notes for the accommodation of third persons, the notes having no connection with the principal's business. The notes were, however, drawn within the ostensible authority of the attorney in fact; and, while they were held to be fraudulent as between the principal and the attorney in fact, nevertheless they were held to bind the principal when in the hands of a *bona fide* holder. In the case of *Camden Safe Deposit and Trust Co. v. Abbott*, 44 N. J. Law, 257, the note in suit "was put forth for the personal benefit of the attorney, who converted its proceeds to his own use." In *Wallace v. Branch Bank at Mobile*, 1 Ala. (N. S.) 565, the attorney in fact was given authority "for the plaintiff and in his name to draw or indorse promissory notes," etc., and the court said: "It is very clear that there is no express delegation of authority to the attorney to draw or indorse notes for the mere accommodation of third persons; such notes, though they might be drawn or indorsed in his name, certainly would not be for the principal himself. Gallagher's right to make and negotiate paper was not unlimited, but was to be restricted to a transaction in which the plaintiff at least had the semblance of interest." In *Adams Express Co. v. Trego*, 35 Md. 47, it was held that a general superintendent of the express company, with authority to employ and discharge agents

and direct their conduct, make contracts, and exercise a general supervision over the business of the company, had no power to license one of his employes, an assistant superintendent, to engage in and carry on a business in competition with and injurious to the express company. The court said, "The powers of an agent are to be exercised for the benefit of the principal only, and not of the agent or of third parties."

Plaintiffs also quote at length from *Mechanics' Bank v. Schaumburg*, 38 Mo. 228. In that case it appeared that Orleans C. Schaumburg and Martha A. Wills each gave to John W. Wills a power of attorney authorizing him "in her business, for her use, and in her name" to perform certain acts; among others, "to borrow money and execute notes." Wills was president of the Mechanics' Bank, to which institution he was indebted in the sum of \$45,000. As attorney in fact he executed notes in the joint names of his two principals for \$85,000 to the cashier of the bank, who drew checks for the amounts in favor of Wills, and the latter immediately deposited the same to his own credit in the bank. All of this money was used by Wills for his private benefit. The bank knew that the loan was actually made to John W. Wills in his name, for his use, and in his business. The court correctly held that Wills' principals were not bound by such acts on the part of their agent. The court held in *Ferreira v. Depew*, 17 How. Prac. 418, that the words employed in the power of attorney did not confer upon the attorney the right to transfer all the principal's property to a trustee for the payment of his (the principal's) debts. In *Johnston v. Wright*, 6 Cal. 373, the principal authorized the attorney in fact "to settle and adjust all partnership debts, accounts, and demands, and all other accounts and demands now subsisting, or which may hereafter subsist, between me and any person or persons whomsoever," and, among other purposes, the power was given to execute releases. The attorney discharged a debt due the principal and two others jointly. In reaching its conclusion the court said: "In *Attwood v. Munings*, 7 Barn. & Cress. 279, the power was to endorse bills 'for

the principal, in his name, and to his use,' and also to 'accept bills drawn by his agents or correspondents.' In the suit upon a bill drawn by one of the partners of the principal for the benefit of the partnership, and accepted by the agent, it was held that the power extended only to the individual business of the principal, and not to his partnership affairs." It is apparent that the court did not understand the ruling in *Attwood v. Munnings*, as no such decision was reached in that case. The California court then went on to say that, as the debt released was neither an individual nor a partnership debt, but a joint debt, the language of the power of attorney was not broad enough to authorize the attorney's act, and said that, if the principal had personally executed the release, and had used only the language contained in the power of attorney, it would have been totally ineffectual to release the covenant on which the controversy rested.

Whether the agents in the last two cases cited acted or assumed to act for the use and benefit of their respective principals, we are unable to ascertain. All of the other authorities cited by plaintiffs will be found, upon examination, to treat of cases wherein the agent acted either for the private benefit of himself or third persons, or else clearly transcended the authority granted him.

In the power of attorney before us Charles A. Clarke is given authority "to sell, remise, release, convey, mortgage, and hypothecate lands, tenements, and hereditaments upon such terms and conditions and under such covenants as he shall see fit." And also "to sign seal, execute, and deliver and acknowledge" such mortgages, hypothecations, bills, bonds, notes, receipts, evidences of debt, and "such other instruments in writing of whatever kind and nature as may be necessary or proper in the premises." Under the language used, can it be successfully contended by any one that Charles A. Clarke had not the right to execute and deliver notes, mortgages, and hypothecations? If he could execute such, for what purpose would the instruments be executed? Certainly to secure debts on the part of the prin-

cipal. When the principal executed the power of attorney he must have contemplated that at some time it would be necessary for his attorney in fact to execute instruments in writing in recognition of debts owed by him, the principal; otherwise, for what purpose were such words as we have last quoted inserted in the power of attorney? (*Lamy v. Burr*, 36 Mo. 85, 88 Am. Dec. 135.) If we were to say that the attorney in fact had no right to execute notes, mortgages, and hypothecations, we might as well say that the principal never executed any power of attorney at all. We have heretofore shown that the debt secured by the trust deed in question was the principal's debt, and, after W. B. Raleigh had executed the instruments conveying all of his property to Albert G. Clarke, Sr., the debt secured was practically the sole and individual debt of Clarke, as between himself and Raleigh. The attorney in fact could not take a new partner into the firm of Raleigh & Clarke, and rather could he dissolve the partnership under his power; but when Raleigh, the other partner, voluntarily turned over all of his property to Clarke, Clarke's attorney in fact, under the power given him, had the right to receive and protect it.

Plaintiffs contend that Charles A. Clarke, as attorney in fact, had no right to execute the guaranty which he indorsed upon the notes. As we view it, this guaranty was useless and nugatory. Albert G. Clarke, Sr., was already liable for the payment of the notes, and the guaranty executed on his behalf imposed upon him no additional obligations whatever, as it was in terms a guaranty of his own debt. (*In re Wm. H. Blumer & Co.* (D. C.), 13 Fed. 622.) The question, then, is, as Charles A. Clarke had the right as attorney in fact to secure the payment of the notes in question, did he have the right to execute the trust deed in controversy, including the power of sale? Every general power implies every particular power necessary to its exercise or performance; in other words, "the authority to accomplish a definite end carries with it the power to adopt the usual legal means to accomplish the object. Chitty on Contracts (Ed. 1860), 236; *Anderson v. Coonley*, 21 Wend. 279." (*Piercy v. Hedrick*, 2 W. Va. 458, 98 Am. Dec. 774.)

In the case of *First National Bank v. Bell S. & C. M. Co.*, 8 Mont. 32, 19 Pac. 403, the court, speaking through Mr. Chief Justice McConnell, said: "While the exact boundary between mortgages with powers of sale, and deeds of trust, is not very clearly defined, we think the deed in question should be classed with the former. * * * But, from the view we take of it, we do not think it important to determine to which class it technically belongs. * * * 'A mortgage is a pledge or security for a debt, whatever may be the form which the transaction takes, whether a simple mortgage deed in form, or a mortgage with a power of sale, or a deed in trust, or a deed absolute on its face, accompanied by an agreement in writing to reconvey or to sell, or to do any other thing upon the payment of a certain sum of money. Courts of equity look upon it as a mortgage, and deal with it as such.' Perry on Trusts, Sec. 602d." In reviewing and affirming this case the United States Supreme Court said: "The power of sale in the indenture, whether we call it a deed of trust or a mortgage, does not change its character as an instrument for the security of the indebtedness designated, but it is an additional authority to the grantee or mortgagee, and, if he does not choose to foreclose the mortgage by any of the ordinary methods provided by law, he can proceed under the power added for the sale of the property to obtain payment of the indebtedness." (*Bell S. & C. M. Co. v. First Nat'l Bank*, 156 U. S. 470, 15 Sup. Ct. 440, 39 L. Ed. 497.) Section 3821, Civil Code, provides: "A power of sale may be conferred by a mortgage upon the mortgagee or any other person, to be exercised after a breach of the obligation for which the mortgage is a security." Section 1293, Code of Civil Procedure, provides: "When a mortgage confers a power of sale, either upon the mortgagee or any other person, to be executed after a breach of the obligation for which the mortgage is a security, either an action may be maintained under this chapter to foreclose, or proceedings may be had under the provisions of the mortgage." We therefore conclude that Charles A. Clarke, as attorney in fact, had the right to execute a mort-

gage in the form of a trust deed, containing a power of sale, just as he would have had the right to execute a mortgage in the ordinary form. Creating a trustee with power of substitution to his successors in trust was not delegating a delegated power. In effect, it merely provided a means for obviating the appointment of a receiver and foreclosure by an action in court in case of a default by the principal. Furthermore, Charles A. Clarke under the trust deed conveyed away the whole legal title. His power over the property then ceased. His act was not a delegation of power, but an execution of the power conferred under the power of attorney. (*Lamy v. Burr, supra.*)

It is also contended by plaintiffs that, even had Charles A. Clarke, as such attorney, the right to execute the trust deed in question, he had no right to include therein a provision for an attorney's fee. It is unnecessary for us to decide this question. The mortgage foreclosure was commenced under the power of sale therein contained, whereas it is distinctly specified in the trust deed that the attorney's fee shall be collected only if the mortgage be foreclosed by an action. Plaintiffs are therefore complaining of something which is not in controversy in this action.

2. Can a power of sale be executed after the death of the mortgagor? The decisions are not in harmony as to whether such a power can be so executed, for the reason that some affirm and some deny the power to be one coupled with an interest. If the power is one coupled with an interest, it can be executed after the death of the grantor; otherwise not. Chief Justice Marshall, in *Hunt v. Rousmanier's Administrators*, 8 Wheat. 174, 5 L. Ed. 589, in speaking of such a power, uses the following language: "We hold to be clear that the interest which can protect a power after the death of a person who creates it must be an interest in the thing itself. In other words, the power must be ingrafted on an estate in the thing. The words themselves would seem to import this meaning. 'A power coupled with an interest' is a power which accompanies or is connected

with an interest." In *Bergen v. Bennett*, 1 Caines' Cases, 1, 2 Am. Dec. 281—a leading case on this subject—the court said: "It is admitted that a naked authority expires with the life of the person who gave it; but a power coupled with an interest is not revoked by the death of the grantor. In my opinion, the power contained in the mortgage is of the latter description. A power simply collateral and without interest, or a naked power, is when, to a mere stranger, authority is given to disposing of an interest in which he had not before, nor hath by the instrument creating the power, any estate whatsoever. But when power is given to a person who derives, under the instrument creating the power or otherwise, a present or future interest in the land, it is then a power relating to the land." It was said by our own court, in *First National Bank v. Bell S. & C. M. Co.*, *supra*: "But the mortgagee has an interest in the land mortgaged. He has a lien upon it for the security of his debt, and this will support the power of sale, and so couple it with an interest in the land that it becomes a part of the security and irrevocable." Says Mr. Jones, in his work on Mortgages (Section 1792): "This being [a power] coupled with an interest in the estate cannot be revoked or suspended by the mortgagor. Of course, after his death the power cannot be exercised in his name, but the authority to execute it in the name of the grantee continues." And see cases cited; *Whitmore v. San Francisco Savings Union*, 50 Cal. 146; *More v. Calkins*, 95 Cal. 435, 30 Pac. 583, 29 Am. St. Rep. 128.

From the foregoing authorities it clearly appears to us that the power of sale included in the trust deed in question is a power coupled with an interest; but, irrespective of this, the legal title to the property having passed to the trustee and from the mortgagor, the death of the latter could in no wise affect the trustee's right to carry out the trust which the mortgagor had reposed in him.

It is argued, however, that foreclosing under a power of sale is inconsistent with our probate law, and that the mortgagee should enforce his rights either through the regular course of

administration or by foreclosure in court. This argument cannot be maintained. "The law may suspend its own process. As it gives the process, it may regulate it. But deeds of trust and mortgages with the power of sale arise from the consent and agreement of parties, and there is no propriety in depriving creditors of the fruits of their foresight and caution." (*Beatie v. Butler*, 21 Mo. 313, 64 Am. Dec. 234.) The Texas cases cited by plaintiffs are not in point. See *In re Horsfall's Estate*, 20 Mont. 495, 52 Pac. 199. It follows that the trustee or his successor in trust, having the legal title, could execute the power of sale (a power coupled with an interest) without reference to the administration of the mortgagor's estate, if he so elected. (Code of Civil Procedure, Section 2603.)

In our opinion, the order should be reversed.

PER CURIAM.—For the reasons given in the foregoing opinion, the order is reversed, and the cause remanded.

Rehearing denied June 13, 1903.

DEUNINCK ET AL., APPELLANTS, v. WEST GALLATIN
IRRIGATION COMPANY, RESPONDENT.

(No. 1,560.)

(Submitted May 1, 1903. Decided May 26, 1903.)

*Damages—Contracts — Provision for Liquidated Damages—
Validity—Burden of Proof.*

1. A contract bound the defendant, an irrigation company, to furnish to plaintiff a certain amount of water during a certain season, and provided that, if the company should for any reason fail to deliver the water, it would return to plaintiff the money paid by him, and plaintiff agreed to accept the same, and to release the company for any damage arising from such failure. Held to fall clearly within Section 2243, Code of Civil Procedure, and to be void on its face to the extent of the liquidated damages agreed on in case of a breach.

2. Where a suit is brought on a contract for the actual—and not the liquidated—damages, it is for the defendant to show by proper answer and competent proof that the contract for stipulated damages is valid under Code of Civil Procedure, Section 2244; such question cannot be presented to the court by demurrer to the complaint.

Appeal from District Court, Gallatin County; F. K. Armstrong, Judge.

ACTION by D. E. Deuninck and another against the West Gallatin Irrigation Company. Judgment for defendant. Plaintiffs appeal. Reversed.

Mr. A. J. Walrath, Mr. W. R. C. Stewart, and Messrs. Holway & Hoffman, for Appellants.

The complaint states a cause of action, and was therefore good on general demurrer. (*Jacobs Sultan Co. v. U. M. Co.*, 17 Mont. 61; Code of Civil Procedure, Section 1003; *Jessup v. Jessup*, 34 N. E. 1017.)

The contract falls squarely within the inhibition of Section 2243, Civil Code, and is void to the extent that it attempts to fix the amount of damages for a breach of the contract in anticipation thereof. (*Greenleaf v. S. C. H. & A. Works*, 21 Pac. 369; *Easton v. Cressen*, 34 Pac. 622; *Drew v. Pedlar*, 25 Pac. 749.)

Even if the contract be not void in the particular above noted, still, the provision for the return of the money for a breach of the contract does not constitute liquidated damages, and plaintiffs are entitled to recover whatever damages they actually suffered. (*Pengra v. Wheeler*, 34 Pac. 354; *O'Keefe v. Dyer*, 20 Mont. 477; *C. S. N. Co. v. Wright*, 6 Cal. 258; *Potter v. Ahrens*, 110 Cal. 681; *Pacific Factory v. Adler*, 90 Cal. 110.)

In order to sustain the demurrer as to the third ground, the complaint must be both ambiguous and uncertain. (*Kraner v. Halsey*, 82 Cal. 209, 22 Pac. 1137; *Wilhoit v. Cunningham*, 87 Cal. 453, 25 Pac. 675; *Greenbaum v. Taylor*, 102 Cal. 624, 36 Pac. 957.)

Messrs. Hartman & Hartman, for Respondent.

Appellants must recover upon this contract if at all, and they are limited in their recovery by the terms of the contract. Appellants insist in their brief that the contract is one for liquidated damages and hence void within the purview of Section 2243 of the Civil Code. Respondent insists, first, that it is not such a contract, but that it is simply a contract reciting the probable inability of respondent to furnish water for irrigating purposes to appellants, and that in the event of such probable failure respondent is to return the money—\$258—which has been paid, and appellants are to hold harmless the said company for any loss or damage arising from its failure or inability to furnish said water or any part thereof as aforesaid; and, second, that if the contract should be construed to be one for liquidated damages that it comes within the purview of Section 2244 of the Civil Code, in that it would be “impracticable or extremely difficult to fix the actual damages” which would accrue to appellants by reason of the failure of respondents to comply with such contract.

A complaint must proceed upon some definite theory, and on that theory the plaintiff must succeed, or not succeed at all. The complaint cannot be made elastic so as to take form with the varying views of counsel. (*Mescall v. Tully*, 91 Ind. 96, p. 99; *State v. Foulkes*, 94 Ind. 493, p. 498; *M. S. & N. T. R. Co. v. McDonald*, 21 Mich. 165, 4 Am. Rep. 466, p. 481-2; *Salisbury v. How*, 87 N. Y. 128, p. 131; *Elliott's Gen. Prac.* Vol. 1, par. 87.)

MR. COMMISSIONER CLAYBERG prepared the opinion for the court.

This is an action upon a written contract, by which it is claimed that respondent agreed to furnish certain water to D. E. Deuninck for the purpose of irrigating 129 acres of his land. The complaint sets forth the contract, and then alleges that, in reliance upon its terms, plaintiffs prepared their land for culti-

vation, and planted crops; that respondent failed to furnish the water contracted for, and that because thereof plaintiffs were damaged in the sum of \$1,981.28. The respondent demurred to this complaint on three distinct and separate grounds, but abandoned two of them upon the argument, and only insisted on the remaining one, which was "that the complaint does not state facts sufficient to constitute a cause of action." The demurrer was sustained by the court below. Plaintiffs stood upon their complaint, and judgment was entered in favor of defendant for its costs. From such judgment this appeal is taken.

The contract sued upon is somewhat peculiar in its provisions, and for a better understanding of all its terms we quote it in full:

"Bozeman, Montana, June 20th, 1899. This is to certify: That the West Gallatin Irrigation Company has this day received from Rev. D. E. Deuninck the sum of Two Hundred and Fifty-Eight Dollars (\$258.00) upon the following conditions, to-wit: Said West Gallatin Irrigation Company agrees to furnish to said D. E. Deuninck 129 inches of water for the irrigation of 129 acres of the land of said D. E. Deuninck, or any part of the same situate convenient for delivery for service from the ditch of the West Gallatin Irrigation Company, in the East $\frac{1}{2}$ of Sec. 24, T. 1 S., R. 3 East, said water to be furnished and delivered during the irrigating season of 1899. If, however, said company shall for any reason fail or be unable to deliver said water to said D. E. Deuninck, according to the terms hereof, it agrees and binds itself to return to said D. E. Deuninck—\$258.00—the amount of money so paid, and said D. E. Deuninck agrees to accept the same and to release and hold harmless the said company for any loss or damage arising from its failure or inability to furnish said water or any part thereof as aforesaid. It being specifically understood and agreed between the parties hereto that the said West Gallatin Irrigation Company is liable, for various causes, to be unable to furnish the said water as herein set forth, and that in the event of such failure or inability to furnish the same and of damage accruing

to said D. E. Deuninck by reason of such failure the said Two Hundred and Fifty-Eight Dollars (\$258.00) constitute liquidated damages therefor and the payment thereof to the said D. E. Deuninck shall constitute payment and settlement in full of such damages. In witness whereof the said D. E. Deuninck has hereunto set his hand and seal, and the West Gallatin Irrigation Company has caused its corporate name to be affixed by its manager, the day and year first above written. Executed in duplicate. Rev. D. E. Deuninck. [Seal.] (Signed) By E. C. Kinney, General Manager."

The questions argued all arise upon the construction of this contract, and the appropriateness and sufficiency of the allegations of the complaint as applied to the contract when construed. Counsel for appellants contend: First, that this contract is void under the provision of Section 2243, Civil Code, to the extent that it attempts to fix the amount of damages for a breach thereof in anticipation of such breach; and, second, if not void, the provisions for the return of the money in case of a breach of its terms do not constitute legal liquidated damages, as provided in Section 2244, Civil Code, and claim that appellants are therefore entitled to recover whatever actual damage they have suffered because of the alleged breach thereof by respondent. Counsel for respondent contend to the contrary upon both of these propositions. The two sections above referred to are as follows:

"Sec. 2243. Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section.

"Sec. 2244. The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage."

It first becomes important to determine the character of the contract, and ascertain whether it is one attempting to provide

for liquidated damages in case of a breach of its terms by respondent in anticipation thereof. It first recites the receipt of \$258 by respondent from appellant Deuninck upon condition that respondent agrees to furnish him with 129 inches of water during the irrigating season of 1899 for the purpose of irrigating 129 acres of land. Thus far it is plain, and needs no construction, and amounts to an absolute promise upon the part of the respondent, in consideration of \$258 thus paid by Deuninck, to furnish the water specified at the time stated. This comprises the entire contract in so far as the furnishing of the water is concerned, for a breach of which the complaint was filed. It then attempts to provide for damages upon a breach thereof in the following language: "If, however, said company shall for any reason fail or be unable to deliver said water to said D. E. Deuninck, according to the terms hereof, it agrees and binds itself to return to said D. E. Deuninck—\$258.00—the amount of money so paid, and said D. E. Deuninck agrees to accept the same and to release and hold harmless the said company for any loss or damage arising from its failure or inability to furnish said water or any part thereof as aforesaid." Then, as if necessary to make the above quoted clause more definite and certain, and to surely limit the liability of the respondent for a breach to the repayment of the consideration received therefor, we find the following clause: "It being specifically understood and agreed between the parties hereto that the said West Gallatin Irrigation Company is liable, for various causes, to be unable to furnish the said water as herein set forth, and that in the event of such failure or inability to furnish the same and of damage accruing to said D. E. Deuninck by reason of such failure the said Two Hundred and Fifty-Eight Dollars (\$258.00) constitute liquidated damages therefor and the payment thereof to the said D. E. Deuninck shall constitute payment and settlement in full of such damages." We see no legal distinction between the two clauses above quoted as to their purpose and effect. Both were evidently intended to accomplish the same purpose and produce the same result, viz., determining and fixing the amount of

damages to be paid in case of a breach of the contract occurred. It seems that it was contemplated that a breach would probably occur, and respondent, in anticipation of such breach, desired that the amount of damages which might accrue therefrom should be limited to the amount of the consideration paid to it for such contract. It will be noticed that the contract is not one to furnish the water if the respondent is able so to do, and, if unable or prevented by any cause, to be excused therefrom, but it is one whereby respondent agrees to furnish the amount of water specified absolutely, and at all events, with a provision that, if it fails so to do for any reason, it is only to be liable to the other contracting party for damages in an amount equal to the sum paid by him as a consideration for the contract.

It seems to us, from a careful consideration of the contract, that it falls clearly within the provisions of Section 2243, *supra*, and is, therefore void to the extent of the liquidated damages agreed upon in case of a breach. If the contract is void in law to this extent, it is of the same legal effect as though such provisions had been entirely omitted from its terms. It therefore was, in legal effect, a contract to furnish 129 inches of water during the irrigating season of 1899 for the purpose of irrigating 129 acres of land. The complaint was evidently framed upon this theory, and is clearly sufficient.

As to the next contention, counsel for respondent claim that, even if it is a contract attempting to provide for liquidated damages for a breach, and is void to that extent, under the provisions of Section 2243, *supra*, it is a good contract for liquidated damages under Section 2244, *supra*; that the suit should have been brought to recover such liquidated damages; and, inasmuch as the complaint is not framed on that theory, the demurrer was properly sustained. Counsel seem to overlook the effect of Section 2243, *supra*, by which all contracts for liquidated damages are to that extent void, "except as provided in the next section." Therefore, if a suit be brought on the contract for the actual, and not the liquidated, damages, defendant must show to the court as a matter of defense that it is errone-

ously instituted. It must be shown to the court by proper pleadings and competent proof that the contract falls within the provisions of Section 2244, *supra*. This does not depend entirely upon the contract itself. Facts must be pleaded and proven from which the court can say as a matter of law that the contract for liquidated damages is valid because "from the nature of the case it would be impracticable or extremely difficult to fix the actual damages." The mere stipulations of the contract are insufficient for that purpose. (*Patent Brick Co. v. Moore*, 75 Cal. 205, 16 Pac. 890; *Pacific Factor Co. v. Adler*, 90 Cal. 110, 27 Pac. 36, 25 Am. St. Rep. 102; *Jack v. Sinsheimer*, 125 Cal. 563, 58 Pac. 130; *Long Beach, etc. v. Dodge*, 135 Cal. 401, 67 Pac. 499.) It is therefore clear that a legal contract for stipulated damages, urged as a defense to a suit brought upon the contract to recover actual damages, cannot be presented to the court by demurrer to such complaint, but must be raised by answer alleging the existence of such facts as bring it clearly within Section 2244, *supra*.

We are of the opinion that the court below erred in overruling said demurrer and entering judgment for defendant, and that the same should be reversed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment of the court below is reversed.

MR. JUSTICE HOLLOWAY was disqualified, and took no part in this decision.

FREDERICK ET AL., APPELLANTS, v. McMAHON,
RESPONDENT.28 263
28 526

(No. 1,583.)

(Submitted May 15, 1903. Decided May 25, 1903.)

Appeal—Rules of Supreme Court—Defective Record—Defective Brief—Affirmance.

Judgment below will be affirmed where the record and appellant's brief fail completely to comply with the requirements of the statutes and the Rules of the Supreme Court.

Appeal from District Court, Cascade County; Dudley DuBose, Judge.

ACTION by W. E. Frederick and Thomas A. Ray, partners doing business as Frederick & Ray, against Thomas McMahon. From a judgment in favor of defendant, and from an order overruling a motion for a new trial, plaintiffs appeal. Affirmed.

Mr. William G. Downing, and Messrs. Toole & Bach, for Appellants.

Mr. Ransom Cooper, for Respondent.

MR. COMMISSIONER CLAYBERG prepared the opinion for the court.

The record and appellants' brief in this case so completely fail to comply with the requirements of the statutes and the rules of this court, that, under the cases of *Cornish v. Floyd-Jones*, 26 Mont. 153, 66 Pac. 838, *Knobb v. Reed*, 28 Mont. 42, 72 Pac. 304, and other numerous former decisions of this court, none of the questions sought to be raised can be considered.

We therefore advise that the judgment be affirmed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment in this case is affirmed.

IN RE WEED.

(No. 1,744.)

(Submitted May 20, 1903. Decided May 25, 1903.)

Attorney—Suspension from Practice—Reinstatement — Sufficiency of Petition.

An attorney who has been suspended for two years for malpractice and criminal deceit, whereby he obtained money from a client, will not be reinstated at the end of one year on a petition, signed by lawyers and citizens, reciting that he was suspended because he was indebted to the client, and which does not express any regret for his culpable acts, or contain any assurance from him or the other petitioners that his future conduct will be upright.

ORIGINAL proceeding for the reinstatement of Elbert D. Weed as a member of the bar of the supreme court. Reinstatement refused.

Mr. Jas. Donovan, Attorney General, presented petition to court.

MR. JUSTICE MILBURN delivered the opinion of the court.

This matter is before us on the petition of Elbert D. Weed, and of others in his behalf, for his reinstatement as a member of the bar of this court.

The court ordered on May 26, 1902, that Mr. Weed be suspended from his office of attorney and counselor and deprived of the right to practice as such in the courts of Montana until the 26th day of May, 1904, at the expiration of which time he might, under the terms of the order, upon proper petition, supported by satisfactory evidence of good conduct meantime, be restored to the privileges of an attorney and counselor. Many persons join in praying that the petition of the applicant be granted. Many of these are lawyers of high standing, and others are persons of importance and prominence in the public service and in private life. It will not serve any useful purpose to state

herein at length the reasons why Mr. Weed was subjected to discipline. It will be sufficient to refer those who should know them to the opinions in *In re Weed*, 26 Mont. 241, 507, 67 Pac. 308, 68 Pac. 1115.

Referring to *In re Newton*, 27 Mont. 182, 70 Pac. 982, we find that a disbarred attorney was restored to the office of attorney and counselor upon it having been made to appear satisfactorily to the court that the petitioner had, "since the order of disbarment, * * * lived an upright, honorable life; that in the estimation of his fellow citizens in the community in which he resides, and also of reputable members of the bar of this state, he is a fit person to be permitted to practice law in the state, and that he expresses the utmost contrition for his said offense." It is necessary that the applicant show much more than appears in the petition before us. He states that the order of suspension was made "by reason of a petition * * * and evidence given in support thereof by one Theodore Mayer, showing that the petitioner herein was indebted to said Mayer in a certain sum of money." Reading the opinion (26 Mont. 507, 68 Pac. 1115), any one will see that the court did not punish Mr. Weed for being indebted to Mr. Mayer. There has not been any such precedent ever established by this court, or by any other, so far as we are advised. If the very numerous signers of the petition in support of the application for reinstatement understood that the applicant was deprived of his office as attorney and counselor because he was indebted to Mayer, such understanding perhaps will account for the fact that so many recommended that the court permit him now to resume the practice of the profession of the law.

The applicant does not mention or refer to any one of the charges upon which he was found guilty; he does not express any regret for any of his culpable acts; and we have not any assurance from him or the other petitioners that his conduct hereafter will be as it should be, or in anywise different from what it was before his suspension. We affirm the reasons stated

in the opinion reported heretofore (26 Mont. 507, 68 Pac. 1115) when the order of suspension was made.

Because the petition of the applicant does not state anything which shows that the applicant has a just conception of the serious nature of the several charges made and proven against him, or that he in any wise regrets having done any of the things which he did, and because those who have joined in his petition do not indicate in the slightest way that they understand why the order was made, or that the applicant for reinstatement has repented of his errors, and further because we are of the opinion that the petition and the papers in support thereof would not be sufficient to induce favorable consideration even if the period of two years had expired, the application of Mr. Weed, made at the end of one year, is denied.

HEGAAS, APPELLANT, v. HEGAAS, RESPONDENT.

(No. 1,587.)

(Submitted May 26, 1903. Decided June 1, 1903.)

*Setting Aside Default Judgment—Discretion of Trial Court—
Appeal—Review.*

Since, under Code of Civil Procedure, Section 774, applications to set aside default judgments are addressed to the discretion of the trial court, its action thereon will not be interfered with unless a manifest abuse of discretion is shown.

Appeal from District Court, Missoula County; F. H. Woody, Judge.

ACTION by Hans H. Hegaas against Emma Hegaas. From an order setting aside a default and judgment, and permitting defendant to appear and defend, plaintiff appeals. Affirmed.

Messrs. Marshall & Stiff, for Appellant.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Appeal from an order setting aside a default and judgment entered upon the failure of the defendant to appear and make defense. The service of summons was constructive, the defendant being a resident of the state of Washington at the time the action was brought. The application was made upon affidavits tending to show that the default and judgment were entered against the defendant through her excusable neglect in failing to interpose her defense within the time allowed by the statute. Under Section 774 of the Code of Civil Procedure such applications are addressed to the discretion of the district court, and, in the absence of a manifest abuse of such discretion, this court will not interfere. We have examined the affidavits filed by the defendant in support of her motion, and we are not able to say that the district court manifestly abused the discretion lodged in it by the statute. The order complained of is affirmed.

Affirmed.

STANTON, APPELLANT, v. LEWIS, RESPONDENT.

(No. 1,586.)

(Submitted May 26, 1903. Decided June 1, 1903.)

Appeal—Transcript—Judgment Roll.

Under Code of Civil Procedure, Section 1736, providing that on an appeal from a final judgment the appellant must furnish the court with a copy of the judgment roll, the court, on appeal from a final judgment, acquires no jurisdiction where the transcript contains no copy of any summons, proof of service, complaint, or other pleadings, constituting a part of the judgment roll, within Section 1196.

Appeal from District Court, Gallatin County; F. K. Armstrong, Judge.

28	267
28	461

ACTION by E. F. Stanton against Ed. Lewis. From a judgment of the district court dismissing an appeal from a justice of the peace, plaintiff appeals. Appeal dismissed.

Mr. E. F. Stanton, in pro per.

Mr. John A. Luce, for Respondent.

PER CURIAM.—This is an appeal from a final judgment made and entered in the district court of Gallatin county upon the dismissal of an appeal to that court from the justice of the peace court. Section 1196 of the Code of Civil Procedure specifies the papers which constitute the judgment roll. Section 1736 of the same Code provides that on an appeal from a final judgment the appellant must furnish the court with a copy of the notice of appeal, of the judgment roll, and of any bill of exceptions or statement in the case upon which the appellant relies. The transcript on appeal in this case contains no copy of any complaint, summons, proof of service, or of any other pleadings in the cause. There is therefore no judgment roll, within the meaning of Section 1196, *supra*. The provisions of Section 1736 are mandatory, and without the judgment roll this court has no jurisdiction to consider an appeal from a final judgment. The appeal is therefore dismissed.

Dismissed.

STATE, APPELLANT, v. KING, RESPONDENT.

(No. 1,944.)

(Submitted May 26, 1903. Decided June 1, 1903.)

*Police Officer—Failure to Make Arrest—Criminal Prosecution
—Information — Constitutional Question — When Determined.*

1. Laws of 1903, Chapter CXI, Section 1, declares that it shall be the duty of every policeman or other peace officer, upon being informed by a citizen that any offense is being or is about to be committed within such officer's jurisdiction, to immediately proceed to the place where the alleged offender is to be found, with the informant, if he so requests, and to arrest such offender, etc. *Held*, that an information against a policeman, alleging that he refused to proceed to the place where alleged offenders were to be found, was insufficient, the statute enjoining but one duty, which was to make an arrest, failure to perform which was the gist of the officer's offense.
2. A court will not pass upon the constitutionality of a statute unless it is absolutely necessary to a decision of the case.

Appeal from District Court, Lewis and Clarke County; II. C. Smith, Judge.

S. R. KING was informed against for a violation of official duty as a policeman in failing to make an arrest, and on demurrer to the information was discharged, from which action of the court the state appeals. Affirmed.

Mr. James Donovan, Attorney General, for the State.

There are three duties which may be imposed upon a peace officer by House Bill 345 by any citizen of the state, and for failure to perform any one or more of them he is guilty of a violation of said law, as follows: (1) Upon receipt of the requisite information to immediately and expeditiously proceed to the place where the alleged offender or offenders are to be found. (2) To proceed in company with the informant, if he so requests. (3) To arrest the alleged offender or offenders wherever they may be found. In the present information, the defendant is charged with a neglect to perform the first of these duties only, and that offense is clearly and without ambiguity stated in the information. It cannot be urged that the information is bad for failure to charge that the defendant refused to make an arrest, for, as a matter of fact, he did not refuse to make an arrest, except by refusing to go to the place where the arrest might be made. By refusing to go to such place he clearly violated his duty as an officer, and under the provisions of said House Bill 345 liable to the penalty prescribed in Section 2 thereof.

Constitutional provisions have not the slightest bearing upon the information in this case, although they might have if the information charged the officer with a refusal to make an arrest, or if the question were raised by a person who might have been arrested by such officer, as, for instance, in *habeas corpus* proceedings. (*Nelson v. People*, 33 Ill. 397.)

The question of the constitutionality of a law cannot be raised by anyone not having an interest in the matter, or not being in point of fact affected by the act. (Cooley on Const. Lim., 196, and cases cited in note 3; 6 Am. & Eng. Ency. Law, p. 1090.)

A question involving the constitutionality of a statute should be determined only when it is impossible to dispose of the case on its merits otherwise, and a court will be especially reluctant to investigate or determine the constitutionality of a statute on preliminary motions * * *." (6 Am. & Eng. Ency Law, p. 1084, and cases cited in note 5; see, also, Cooley on Const. Lim., p. 196; *Nelson v. People*, 33 Ill. 390; *State v. Curler*, 67 Pac. 1075 (Nev.); *MacGinnis v. Davis*, 65 Pac. 364 (Ida.)

On the prosecution of an officer for accepting a bribe for omitting to seize gambling devices, the officer cannot question the constitutionality of the statute authorizing the destruction of the property. (*Newman v. People*, 23 Colo. 300, 47 Pac. 278.)

But assuming that the question can be raised by the defendant in this case by demurrer to the information, and conceding, for the sake of argument, that House Bill 345 is in conflict with the constitutional provisions invoked, in so far as said bill makes it the duty of the officer "to arrest such offender or offenders wherever they may be found," still we maintain that the bill is unconstitutional only to the extent that it is repugnant to the constitution.

Where part only of a statute or section is unconstitutional that part only is void, unless the other provisions are so dependent or connected that it cannot be presumed the legislature would have passed one without the other. (Sedgwick, Constr.

St. & Const. Law, p. 413, and cases cited; Sutherland, St. Constr. Sec. 169; *People v. Hill*, 7 Cal. 97; *Nelson v. People*, 33 Ill. 390; *Commonwealth v. Hitchings*, 5 Gray, 482; *Mayor v. Dechart*, 32 Md. 369; *Mobile, etc. R. R. v. State*, 29 Ala. 573; *Lynch v. Steamer Economy*, 27 Wis. 69; *State v. Wheeler*, 25 Conn. 290; 6 Am. & Eng. Ency. Law, p. 1088.)

"With the wisdom or expediency of a law the judiciary has nothing to do; such questions address themselves solely to the law-making department of the government." (6 Am. & Eng. Ency. Law, p. 1086.)

When the statute is otherwise free from objections on constitutional grounds, the courts cannot avoid its application and enforcement because it is absurd or unreasonable, nor because, in their judgment, it is an unwise enactment. (*Ibid.*, citing: *Wint River Steamboat Co. v. Foster*, 48 Am. Dec. 248; *Merchants' Union Barb Wire Co. v. Brown*, 18 Rep. 591; see, also, Cooley, Const. Lim. p. 220.)

It is not within the province of the judiciary to inquire into the motives actuating the law-making body. (Cooley, Const. Lim. p. 220; 6 Am. & Eng. Ency. Law, p. 1087, and cases cited in note 5; *Ex parte Newman*, 9 Cal. 502; *McCulloch v. State*, 11 Ind. 424; *Stockton, etc. R. R. Co. v. Stockton*, 41 Cal. 147.)

If it be argued that it would be a vain thing to require an officer to proceed to the place where the offense was being committed without making it his duty to arrest the offenders if he should find them, and that the legislature would never have imposed that duty upon the officer without also requiring him to make an arrest, and that, therefore, the act in question is not separable, then the reply is that when the officer reaches the point where the breach of the peace is alleged to be occurring, if he finds that his information is true and that the offense is being committed at that time, or is about to be committed, it is then his duty, under Section 1632, to arrest the offenders without a warrant; and for a failure to make an arrest under each circumstance he is punishable, under Section 270, Penal Code, (3 Cyc. Law, p. 883, and cases cited in note 78.)

By the use of the word "arrest" the legislature undoubtedly intended it in its legal significance. The constitutional provisions cited do not contain the word "arrest," but use the words "unreasonable searches and seizures." The word "arrest" is defined by Section 1630, Penal Code, as "taking a person into custody in the case and in the manner authorized by law." That section further provides that "an arrest may be made by a peace officer or by a private person." Substituting for the word "arrest," as used in the statute under consideration, the definition of that term, we find that by House Bill 345 it is made the duty of the peace officer "to take into custody in the manner authorized by law such offender or offenders wherever they may be found." The law in question does not pretend to define either the case or the manner in which the arrest shall be made. It does not authorize, or pretend to authorize, the officer to arrest for an offense which has been committed, unless, of course, such offense is a felony and he has reasonable grounds for suspecting the person arrested to be the offender. There is no intent apparent on the part of the legislature to authorize or require the officer to arrest a person who may be pointed out by the informant because the informant may not accompany the officer, and if he does accompany the officer it is only for the purpose of guiding him to the place where the offense is being committed or about to be committed.

The presumption of a legislative intent to violate the constitution is never to be assumed if the language of the statute can be satisfied by a contrary construction. The application of this rule requires that wherever a statute is susceptible of two constructions, of which one would make it unconstitutional and the other constitutional, the latter is to be adopted. (Endlich, Constr. St., 178, and cases cited.)

Laws are presumed to be passed with deliberation and with knowledge of all existing laws on the subject. (Sutherland, St. Const., Sections 137 and 333.)

In interpreting any clause of a statute it should be construed in connection with existing laws and should be interpreted in

the light of the objects and purposes that the legislature had in view in its enactment. (*Ter. v. Comm'rs Cascade Co.*, 8 Mont. 407; see, also, Section 15, Political Code.)

It will be presumed in construing a statute that the legislature did not intend it to have an effect which would have rendered it unconstitutional. (*Gillette v. Hibbard*, 2 Mont. 415.)

Every presumption is in favor of the constitutionality of a legislative enactment, and the judicial department will be justified in pronouncing it unconstitutional only when it becomes a manifest usurpation of power. (6 Am. & Eng. Ency. Law, p. 1086, and cases in note 1; *Cooley*, Const. Lim., p. 218.)

The power of the judiciary to declare a statute unconstitutional should never be exerted except where the conflict between it and the constitution is palpable and incapable of reconciliation. (*Stockton, etc. R. R. Co. v. City of Stockton*, 41 Cal. 147.)

The unconstitutionality of a statute must be clear and manifest before a court should declare it, so that where any reasonable doubt exists as to its constitutionality it should be upheld. (6 Am. & Eng. Ency. Law, p. 1085; *People v. Van Gaskin*, 5 Mont. 352; *People v. Ry. Co.*, 35 Cal. 606; *Ex parte Newman*, 9 Cal. 502.)

"An intention to take away or destroy individual rights is never presumed, and to give effect to a design so unjust and so unreasonable would require the support of the most direct and explicit affirmation declarative of such intent." (6 Am. & Eng. Enc. Law, p. 924.)

Messrs. Nolan & Loeb, for Respondent.

At common law, as a general rule, an arrest could not be made, without warrant, for an offense less than felony, except for breach of the peace. (3 Cyc., 880, citing: *Robertson v. State*, 29 So. 535; *Commonwealth v. Wright*, 158 Mass. 149, 38 N. E. 82, 35 Am. St. Rep. 475, 19 L. R. A. 206; *Scott v. Eldridge*, 154 Mass. 25, 27 N. E. 677, 12 L. R. A. 379; *Com-*

ACTION by E. F. Stanton against Ed. Lewis. From a judgment of the district court dismissing an appeal from a justice of the peace, plaintiff appeals. Appeal dismissed.

Mr. E. F. Stanton, in pro per.

Mr. John A. Luce, for Respondent.

PER CURIAM.—This is an appeal from a final judgment made and entered in the district court of Gallatin county upon the dismissal of an appeal to that court from the justice of the peace court. Section 1196 of the Code of Civil Procedure specifies the papers which constitute the judgment roll. Section 1736 of the same Code provides that on an appeal from a final judgment the appellant must furnish the court with a copy of the notice of appeal, of the judgment roll, and of any bill of exceptions or statement in the case upon which the appellant relies. The transcript on appeal in this case contains no copy of any complaint, summons, proof of service, or of any other pleadings in the cause. There is therefore no judgment roll, within the meaning of Section 1196, *supra*. The provisions of Section 1736 are mandatory, and without the judgment roll this court has no jurisdiction to consider an appeal from a final judgment. The appeal is therefore dismissed.

Dismissed.

STATE, APPELLANT, v. KING, RESPONDENT.

(No. 1,944.)

(Submitted May 25, 1908. Decided June 1, 1908.)

*Police Officer—Failure to Make Arrest—Criminal Prosecution
—Information — Constitutional Question — When Determined.*

1. Laws of 1903, Chapter CXI, Section 1, declares that it shall be the duty of every policeman or other peace officer, upon being informed by a citizen that any offense is being or is about to be committed within such officer's jurisdiction, to immediately proceed to the place where the alleged offender is to be found, with the informant, if he so requests, and to arrest such offender, etc. *Held*, that an information against a policeman, alleging that he refused to proceed to the place where alleged offenders were to be found, was insufficient, the statute enjoining but one duty, which was to make an arrest, failure to perform which was the gist of the officer's offense.
2. A court will not pass upon the constitutionality of a statute unless it is absolutely necessary to a decision of the case.

Appeal from District Court, Lewis and Clarke County; H. C. Smith, Judge.

S. R. KING was informed against for a violation of official duty as a policeman in failing to make an arrest, and on demurrer to the information was discharged, from which action of the court the state appeals. Affirmed.

Mr. James Donovan, Attorney General, for the State.

There are three duties which may be imposed upon a peace officer by House Bill 345 by any citizen of the state, and for failure to perform any one or more of them he is guilty of a violation of said law, as follows: (1) Upon receipt of the requisite information to immediately and expeditiously proceed to the place where the alleged offender or offenders are to be found. (2) To proceed in company with the informant, if he so requests. (3) To arrest the alleged offender or offenders wherever they may be found. In the present information, the defendant is charged with a neglect to perform the first of these duties only, and that offense is clearly and without ambiguity stated in the information. It cannot be urged that the information is bad for failure to charge that the defendant refused to make an arrest, for, as a matter of fact, he did not refuse to make an arrest, except by refusing to go to the place where the arrest might be made. By refusing to go to such place he clearly violated his duty as an officer, and under the provisions of said House Bill 345 liable to the penalty prescribed in Section 2 thereof.

ted, by any person or persons, within the limits of such officer's jurisdiction, to immediately and expeditiously proceed to the place where the alleged offender or offenders are to be found, in company with the informant, if he so requests, and to arrest such offender or offenders wherever they may be found."

The first question is whether the information states a public offense, under the terms of the above Act. We find upon examination of the Act that it attempts to impose an official duty on the part of peace officers, and provides a punishment for neglect or violation of the same. What is the duty thus imposed, and is a violation of such duty alleged in the information?

A careful reading discloses that the Act seeks to impose the duty upon peace officers, when "informed by any citizen of this state that any offense against the laws of this state is being committed or is about to be committed, * * * to immediately and expeditiously proceed to the place where the alleged offenders are to be found," and to arrest them.

It is perceived that the duty is not alone to proceed "immediately and expeditiously to the place where the alleged offenders are to be found," but also to arrest them. Were it not for the insertion of the words "immediately and expeditiously" the only duty imposed would be the arrest, because of the impossibility of making an arrest without going to the place where the offenders are to be found. These words evidently were inserted only for the purpose of compelling prompt action on the part of the officer.

Counsel for the state argues that this Act imposes three several and distinct duties upon peace officers, as follows: "(1) Upon receipt of the requisite information, to immediately and expeditiously proceed to the place where the alleged offender or offenders are to be found; (2) to proceed in company with the informant, if he so requests; (3) to arrest the alleged offender or offenders wherever they may be found." We cannot agree with counsel's contention. We are firmly of the opinion that the purpose of the statute is to provide for the arrest of the offender, and the making of such arrest is the ultimate duty im-

posed. This duty consists of several steps or acts, and these steps or acts are each and all parts and portions of this ultimate duty. None of them are separate or distinct duties in themselves, and therefore a violation of one or more of them, except possibly the final one, can be punished only upon an alleged violation of the duty to arrest. The public offense declared by the statute is the violation of this ultimate duty.

It appears from the information that the violation of duty charged is "that the said S. R. King did then and there willfully and wrongfully fail, neglect, and refuse to immediately and expeditiously, or at all, proceed to the Capital Music Hall, or to the place where said alleged offender or offenders were to be found." This is not sufficient, because it only charges a violation of one of the steps preliminary to the ultimate duty. We are therefore clearly of the opinion that the facts stated in the information do not constitute a public offense, and that the demurrer was properly sustained.

We shall not consider the questions raised as to the constitutionality of the Act. It is well-settled law that a court will not pass upon the constitutionality of any Act of the legislature unless it is absolutely necessary to a decision of the case. It is not necessary here, and we do not even intimate an opinion upon this question.

We are of the opinion that the demurrer was properly sustained, and that the judgment of the court below should be affirmed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment of the lower court is hereby affirmed.

WESTERN RANCHES, LIMITED, APPELLANT, v. COUNTY OF CUSTER, RESPONDENT.

(No. 1,577.)

Submitted May 15, 1903. Decided June 1, 1903.)

Taxation—Board of Equalization—Increase in Assessment—Necessity of Notice—Waiver—Property Not Owned by Taxpayer — Action for Restitution — Propriety of Remedy—Constitutionality of Statute—Sufficiency of Title.

1. Under Political Code, Section 3789, providing that persons interested must be notified by letter, at least ten days before action is taken, of the day when an increase in a tax assessment will be considered by the board of county commissioners sitting as a board of equalization, the ten-day notice is jurisdictional.
2. Failure to give a taxpayer the ten-day notice of a proposed increase in his assessment, required by Political Code, Section 3789, is not waived by his subsequently appearing and securing a reduction of the increased assessment.
3. A tax cannot be lawfully levied against a person for property which he does not own.
4. Political Code, Section 4023, authorizes an injunction to restrain the collection of an illegal or unauthorized tax. Section 4024 provides that in all cases "of levy of taxes," etc., deemed unlawful by the property owner, he may, under protest, pay such tax, and thereupon sue to recover it. Section 4026 provides that this remedy shall supersede injunction and all other remedies which might be invoked to prevent the collection of taxes alleged to be irregularly "levied or demanded," etc. *Held*, that Section 4024, being construed with Section 4026, is not restricted to cases in which the levy is assailed as unlawful, but suit thereunder might be brought where an assessment was void, notwithstanding Section 4023.
5. Under Political Code, Section 5185, providing that if any of the acts enumerated in such Code are inconsistent with any acts passed by the Fourth legislative assembly the latter shall control, Sections 4024 and 4026, providing a special remedy by suit for the recovery of illegal taxes, being part of the special act approved March 18, 1895, will control, in case of conflict, Section 4023, authorizing injunction; the latter section having been recommended by the code commission.
6. An increase in an assessment by the assessor in obedience to a void order of the board of equalization cannot be justified under Political Code, Sections 3701, 4014, under which the assessor may assess at any time property which has escaped taxation.
7. Political Code, Sections 4024-4026, providing a remedy by action for the recovery of illegal taxes, were contained in an act approved March 18, 1895, and entitled "An Act providing for unlawful levy and collection of public revenue." Constitution, Article V, Section 23, requires the subject-matter of acts to be clearly expressed in their titles." *Held*, that the act of March 18, 1895, was not unconstitutional, the words "providing for unlawful levy," etc., being construed as meaning "providing a remedy for unlawful levy," etc.

Appeal from District Court, Custer County; C. H. Loud, Judge.

ACTION by the Western Ranches, Limited, against the County of Custer. From a judgment for defendant, entered on sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

STATEMENT OF THE CASE BY THE COMMISSIONER PREPARING
THE OPINION.

This action was commenced by plaintiff to recover of the defendant the sum of \$975.63 for taxes paid under protest. After stating the corporate existence of plaintiff and defendant, it is alleged in the amended complaint that the only property the plaintiff owned, claimed, controlled, managed, or possessed at 12 o'clock m. on the first Monday of March, 1896, or at any other time during said year, which was situated in the county of Custer or elsewhere in the state of Montana, consisted of 200 head of horses and 1,000 head of stock cattle; that said cattle, on the 1st day of March, and at all times during the said year, were not worth or of a cash value to exceed \$17 per head, and that during all such time the horses were not worth or of a cash value to exceed \$15 per head; that between the first Monday of March, 1896, and the second Monday in July, 1896, the assessor assessed to the plaintiff 1,000 head of stock cattle at a valuation of \$17 per head, but that the commissioners of Custer county, sitting as a board of equalization, on the 20th day of July, 1896, "without notifying this plaintiff, and without this plaintiff being present or having any knowledge thereof, and without giving this plaintiff an opportunity to be heard, and without jurisdiction, or right, or authority so to do, and without any investigation or hearing any evidence as to the property of plaintiff, determined that the assessment to this plaintiff of 1,000 head of stock cattle as aforesaid was incorrect and incomplete, and thereupon increased said assessment, and directed

the said assessor to assess to this plaintiff, in addition to the assessment theretofore made, 300 head of beef cattle at a valuation of \$25 per head; 4,000 head of stock cattle at a valuation of \$17 per head; 300 saddle and work horses at a valuation of \$20 per head; ranch improvements at a valuation of \$100; wagons and harness at a valuation of \$150; making a total of \$149.350, which, together with the previous assessment, made a total of \$166,350, which assessment the assessor thereupon made pursuant to and in accordance with said direction."

On the 6th day of August, 1896, the plaintiff appeared before the board of equalization, and made written application for a reduction of the amount of property assessed, and for a reduction of the valuation placed upon the horses, but the board refused to reduce or correct the assessment, except to the extent of changing and reducing the number of head of stock cattle to 2,750, and the number of beef cattle to 1,000, and the number of saddle horses to 200, but entirely abated and canceled the assessment on account of ranch improvements, wagons and harness. For the purpose of preventing the seizure and sale of plaintiff's property, plaintiff, to satisfy the tax which it claimed was illegal, upon the demand of the treasurer of the county, paid the same under written protest upon the 7th day of December, 1896, to the extent of \$1,325.63, but, claiming at the time that the sum of \$975.63 was an invalid and illegal tax, notified the treasurer that it would institute an action against the county to recover the latter sum, with interest thereon, and costs.

The defendant demurred to this complaint on the ground that it does not state facts sufficient to constitute a cause of action. This demurrer was sustained, and judgment entered thereon dismissing the complaint, and for costs, from which plaintiff appeals.

Mr. C. R. Middleton, and Mr. M. S. Gunn, for Appellant.

Mr. James Donovan, for Respondent.

MR. COMMISSIONER CALLAWAY prepared the opinion for the court.

1. In causing plaintiff's assessment to be increased, the board of county commissioners, sitting as a board of equalization, assumed to act under Section 3789 of the Political Code, which reads as follows: "During the session of the board of county commissioners it may direct the assessor to assess any taxable property that has escaped assessment, or to add to the amount, number or quantity of property when a false or incomplete list has been rendered, and to make and enter new assessments (at the same time canceling previous entries) when any assessment made by him is deemed by the board so incomplete as to render doubtful the collection of the tax; but the clerk must notify all persons interested, by letter deposited in the postoffice, postpaid, and addressed to the person interested, at least ten days before action is taken, of the day fixed when the matter will be investigated."

It is patent that the board had no jurisdiction to increase the plaintiff's assessment without first giving the ten-days' notice provided by statute. In *Western Ranches v. Custer County* (C. C.), 89 Fed. 577, Judge Knowles, in passing upon the above-quoted section, said: "Did the failure to give the notice before the listing of the property invalidate the tax? I think it did. The notice required by this section was for the protection of the taxpayer, and intended to give him a hearing before the listing of his property in a supplemental list, and was jurisdictional. Without such notice the board of equalization has no right to order the assessor to make the supplemental list. (Cooley, Tax'n (2d Ed.), 362-366; *French v. Edwards*, 13 Wall. 506, 20 L. Ed. 702; *Powder River Cattle Co. v. Board of Commissioners of Custer Co.* (C. C.), 45 Fed. 323; *Dykes v. Mortgage Co.*, 2 Kan. App. 217, 43 Pac. 268.)" And see *Commissioners v. New York Mining Co.*, 76 Md. 549, 25 Atl. 864; *Myers v. Baltimore County*, 83 Md. 385, 35 Atl. 144, 34 L. R. A. 309, 55 Am. St. Rep. 349; *Commissioners v. Lang*, 5 Kan. 284; *Topeka Water Supply Co. v. Roberts*, 45 Kan. 363, 25 Pac. 855.

The failure to give plaintiff the required notice having ren-

dered the tax illegal because the board had acquired no jurisdiction to act with reference thereto, the fact that the plaintiff voluntarily appeared on August 8th, and asked a reduction of its assessment, which was partially granted, did not obviate or waive the want of jurisdiction in the board's original action. This question was not raised in *Cosier v. McMillan*, 22 Mont. 484, 56 Pac. 965, cited by defendant. Plaintiff was seeking a reduction of its assessment, and therefore properly appeared before the board to ask the same. (*Barrett v. Shannon*, 19 Mont. 397, 48 Pac. 746.)

But, without reference to the illegal action of the board, it appears from the complaint that the plaintiff was assessed for a large amount of property of which it was not the owner. It is fundamental that a tax cannot be lawfully levied against a person for property which he does not own.

2. The defendant contends, however, that Section 4024, Political Code, which provides that "in all cases of levy of taxes, licenses or other demands for public revenue, which is deemed unlawful by the party whose property is thus taxed or from whom such tax or license is demanded or enforced, such party may pay under protest such tax or license, or any part thereof deemed unlawful, to the officers designated and authorized by law to collect the same; and thereupon the party so paying or his legal representative may bring an action in any court of competent jurisdiction against the officer to whom said tax or license was paid or against the county or municipality on whose behalf the same was collected, to recover such tax or license or pay any portion thereof paid under protest"—applies only to cases in which the *levy* of taxes is deemed unlawful, and does not apply to cases where the *tax* or the collection of it is complained of. It is argued that, where the tax is illegal, or is not authorized by law, the collection of it must be restrained under the provisions of Section 4023, or else must be recovered after a payment made under duress.

We do not think this argument is sound. This section must be read together with Section 4026, which is as follows: "The

remedy thereby [hereby] provided shall supersede the remedy of injunction and all other remedies which might be invoked to prevent the collection of taxes or licenses alleged to be irregularly levied or demanded except in unusual cases where the remedy hereby provided is deemed by the court to be inadequate." The words "levy of taxes, licenses or other demands for public revenue" in Section 4024 are to be construed with the words "levied or demanded" in Section 4026. Section 4023 was recommended by the code commission, and adopted as part of the Political Code. Sections 4024 and 4026 were part of a special Act, which was approved March 18, 1895, and, if there be any conflict between Section 4023 and Sections 4024 and 4026, the latter sections control. (Section 5185, Political Code.) Speaking of Sections 4024 and 4026, *supra*, Judge Knowles said: "These sections provide a remedy for the collection of money paid for or on account of an illegal tax to the treasurer or tax collector of any county or municipality of this state. * * * This is a special statute, and is intended to give an exclusive remedy, except in unusual cases, where there is a dispute as to the legality of the tax between a taxpayer and a county or municipality. (End. Inter. St. Sec. 154.) When a special and exclusive remedy is given by a statute, we look alone to it, and are required to follow it." (*Western Ranches v Custer County, supra.*) This is in accordance with our views, and we think the plaintiff pursued the proper remedy in paying the taxes demanded under protest, and afterwards bringing suit to recover them.

3. It is insisted by the defendant that under Sections 3701 and 4014 of the Political Code the assessor may assess property which has escaped taxation at any time, and therefore the assessment levied upon plaintiff's property can be sustained under such sections. But this position is not maintainable for the reason that the record shows the action of the assessor to have been based upon the order of the board of equalization; and further shows that the property sought to be assessed did not escape

taxation for the reason that, in so far as the plaintiff is concerned, it was not in existence.

4. Defendant further contends that Sections 4024, 4025, and 4026 are unconstitutional. These sections were enacted in the form of Senate Bill No. 69, which was approved March 18, 1895, and was entitled "An Act providing for unlawful levy and collection of public revenue." It is argued that this title does not comply with Section 23 of Article V of the Constitution, which provides: "No bill, except general appropriation bills and bills for the codification and general revision of the laws shall be passed containing more than one subject which shall be clearly expressed in its title; but if any subject shall be embraced in any act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed." The purpose of this section was to prevent surprise and fraud in legislation, and generally to inform every one of the subject under consideration. This court, speaking through Mr. Justice Milburn, in *State v. Courtney*, 27 Mont. 378, 71 Pac. 308, held that this section should receive a liberal construction, and the general rule is that "courts will not pronounce a statute unconstitutional unless it is clearly so, and both the statutes and the constitutional provisions with which they are claimed to be in conflict will be liberally construed with a view to sustaining legislative action." See note to *Crookston v. County Commissioners*, 79 Am. St. Rep. 453, and cases cited (s. c. 79 Minn. 283, 82 N. W. 586). "If the title of an Act is single, and directs the mind to the subject of the law in a way calculated to direct the attention truly to the matter which is proposed to be legislated upon, the object of the provision is satisfied." (*Mobile Transportation Co. v. City of Mobile*, 128 Ala. 335, 30 South. 645, 86 Am. St. Rep. 143.)

Testing the Act in question by these rules, it is manifest that the legislature enacted a law concerning the unlawful levy and collection of public revenue. The subjects included in the bill are all germane to the unlawful levy and collection of public revenue. Neither the legislature nor the public could have been

misled by the title of the Act. Any other interpretation of the language employed would be absurd. The author of the bill did not happily frame its title. Probably he intended to say, "An Act providing a remedy for the unlawful levy and collection of public revenue," but, aside from conjecture, he did express this meaning in the title of the bill. By reference to the Century Dictionary, the word "provide" will be found to be defined as follows: "To take measures for counteracting or escaping something; often followed by 'against' or 'for;'" and the word "for" as follows: "In relation to; with respect or regard to; as affects or concerns; as regards." Therefore the title in controversy clearly reads, "An Act providing with respect to [or as concerns] unlawful levy and collection of public revenue," and easily comes within the intent and meaning of the constitutional provision.

It thus appears that the action of the board of county commissioners in raising the assessment upon plaintiff's property was illegal for two reasons: first, that it had no jurisdiction to act without first giving the ten days' notice provided by law; and, second, that it assumed to assess property which the plaintiff did not own. The plaintiff, having paid its tax under protest, agreeably to the provisions of the sections *supra*, and having thereafter brought this suit, is entitled to recover upon the showing made by the complaint.

In our opinion, the judgment should be reversed, and the cause remanded, with directions to overrule the demurrer.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded, with directions to overrule the demurrer.

MR. JUSTICE MILBURN, being disqualified in this case, takes no part in this decision.

MATADOR LAND & CATTLE COMPANY, APPELLANT,
v. COUNTY OF CUSTER, RESPONDENT.

(No. 1,578.)

(Submitted May 15, 1903. Decided June 1, 1903.)

*Taxation—Board of Equalization—Increase in Assessment—
Sufficiency of Notice.*

POLITICAL CODE, SECTION 3780, requires the board of county commissioners to meet as a board of equalization on the third Monday of July, and continue in session from time to time not later than the second Monday in August. SECTION 3789 requires a ten-day notice to be given by mail to persons interested of a contemplated increase in a tax assessment by the board of equalization. *Held*, that a notice mailed August 8th was void, the functions of the board as a board of equalization expiring on the second Monday of August, which was the 10th of the month.

Appeal from District Court, Custer County; C. H. Loud, Judge.

ACTION by the Matador Land & Cattle Company against the County of Custer. From a judgment for defendant, entered or sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

Mr. C. R. Middleton, and Mr. M. S. Gunn, for Appellant.

Mr. James Donovan, Attorney General, for Respondent.

MR. COMMISSIONER CALLAWAY prepared the opinion for the court.

As this case and *Western Ranches v. County of Custer*, 28 Mont. 278, 72 Pac. 659, decided this day, were heard together and as the main questions involved in both cases are the same, the decision in that case applies to this, so far as the two cases are similar. The only difference seems to be that in the *Western Ranches Case* the board of equalization utterly failed to give

the plaintiff any notice, while in the case at bar the board on August 8, 1896, gave the plaintiff notice to appear on September 8th following, when the plaintiff might make such legal objections as it might desire, and when the board would take final action on the assessment. The plaintiff appeared, and asked the board to reduce the assessment made, but the board refused so to do. On August 8th the board could not have given the plaintiff the ten days' notice required by Section 3789 of the Political Code, as its functions as a board of equalization expired on the second Monday of August, which was on the 10th of the month. Section 3780 of the Political Code reads as follows: "The board of county commissioners is the county board of equalization and must meet on the third Monday of July in each year, to examine the assessment book and equalize the assessment of property in the county. It must continue in session for that purpose from time to time until the business of equalization is disposed of, but not later than the second Monday in August." While boards of equalization are provided for in the constitution, their periods of life are prescribed by the legislature, and they cannot hold for any other or longer period than the legislature has fixed. So, when the board of equalization of Custer county adjourned on the second Monday of August, 1896, its term of existence for that year absolutely expired. (*State v. Central Pacific Railroad Co.*, 21 Nev. 270, 30 Pac. 693; *State ex rel. Evans v. McGinnis*, 34 Ind. 452; *Yocum v. First Nat'l Bank*, 144 Ind. 272, 43 N. E. 231.)

It follows that the judgment should be reversed, and the cause remanded, with directions to overrule the demurrer.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded, with directions to overrule the demurrer.

MR. JUSTICE MILBURN, being disqualified, took no part in this decision.

STANFORD, RESPONDENT, v. CORAM ET AL., DEFENDANTS;
CORAM, APPELLANT.

(No. 1,919.)

(Submitted May 14, 1903. Decided June 1, 1903.)

Judgments—Interest—Constitutional Law.

1. Civil Code, Section 2588, provides that a judgment shall bear interest at the rate of 10 per cent. per annum. Laws of 1899, p. 116, amends Section 2588 so as to reduce the interest to 8 per cent., repeals all acts in conflict with it, and provides that it shall take effect from and after its approval. *Held*, that a judgment rendered prior to the date when the amendment went into effect bore 10 per cent. interest until that date, and only 8 per cent. thereafter.
2. A statute changing the rate of interest which a judgment shall bear after entry is not unconstitutional as affecting a contract right within the meaning of Section 10, Article I, of the Constitution of the United States, and Section 11, Article III, of the Constitution of Montana.

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

ACTION by James T. Stanford, as receiver of the Northwestern National Bank of Great Falls, against Joseph A. Coram and another. From an order denying the motion of defendants to compel plaintiff to satisfy the judgment rendered in his favor, Joseph A. Coram appeals. Reversed.

Mr. M. S. Gunn, for Appellant.

In the case of *Morley v. Lake Shore & Mich. S. R. Co.*, 146 U. S. 162, it was decided that the legislature of a state has the power to reduce the rate of interest on existing judgments. See, also, *O'Brien v. Young*, 95 N. Y. 428; *Wyoming National Bank v. Brown*, 61 Pac. 465, S. C. 75 Am. St. Rep. 935; *Palmer v. Laberee*, 63 Pac. 216. It is held in these cases that a judgment is not a contract, and that the right to recover interest is a statutory right, and such holding is made the basis of the decisions. That the right to recover interest is a statutory right,

see, also, *Isaacs v. McAndrew*, 1 Mont. 437; *Palmer v. Murray*, 8 Mont. 174. That a judgment is not a contract, see, also, 1 Black, Judgments (2d Ed.), Secs. 7, 8, 9, 10.

As a judgment is not a contract and interest is a creature of the statute, it necessarily follows that the legislature may change the rate of interest on existing judgments. When the amendatory act, approved February 28, 1899, went into effect, it operated to repeal and render nugatory Section 2588 of the Civil Code. After such repeal the right to interest was dependent solely upon the amendatory act.

Mr. M. M. Lyter, and Mr. A. C. Gormley, for Respondents.

Sedgwick, in his work on the Construction of Statutes and Constitutions (2d Ed.), after stating that retrospective or retroactive statutes, independently of certain exceptions, are within the scope of the legislative authority, yet says that "such laws, as a general rule, are objectionable, and the judiciary will give all laws a prospective operation only, unless their language is so clear as not to be susceptible of any other construction." (Page 173.) Again he says: "The courts refuse to give statutes a retroactive construction unless the intention is so clear and positive as by no possibility to admit of any other construction." (Page 166.)

Though the legislature may have the power to make a law operate retrospectively, it must clearly appear that such was the intention, the presumption being that it was intended to operate on future transactions. (*Cooley, Const. Lim.*, 370; *Wade, Retr. Laws*, Sec. 34; *Duval v. Malone*, 14 Grat. 24; *Murdock v. Franklin Ins. Co.*, 10 S. E. 777; *Watkins v. Glenn* (Kan.), 40 Pac. 316; *Auffmordt v. Rasin*, 102 U. S. 620.)

The foregoing principle was followed in the cases cited below, the court in the first named case saying: "When demands are finally merged into judgments, subsequent changes by law of the rates of interest will not affect such judgments, unless the statutes so declare." (*Missouri Pac. R. R. Co. v. Patton*

(Tex.), 35 S. W. 477; *Saunders v. Carroll*, 12 La. An. 793.)

The following additional cases hold that it is not in the power of the legislature to alter the rate of interest to which a creditor is entitled upon his pre-existing judgment: *Cox v. Marlatt*, 36 N. J. L. 389; *Johnson v. Butler*, 2 Ia. 535; *Rockwell v. Eutler* (Colo.), 17 L. R. A. 611; *Sharpe v. Morgan Co.*, 44 Ill. App. 346; *Bond v. Dolby* (Neb.), 23 N. W. 351; *Freeman on Judgments*, Secs. 217, 441.

Some very pertinent and interesting observations upon the *Morley* decision, and also references to other decisions of the Supreme Court of the United States, are found in the case of *Bettman v. Crowley* (Wash.), 40 L. R. A. 815.

The Supreme Court of the United States has, however, in the case of *Texas & Pacific Railway Co.*, 149 U. S. 237, 37 L. Ed. 717, virtually repudiated the doctrine laid down in the *Morley* Case. See, also, as bearing somewhat on principles involved, *Barnitz v. Beverly*, 163 U. S. 118, 41 L. Ed. 93, followed in *State v. Gilliam*, 18 Mont. 109.

That the judgment did not express the rate of interest is of no moment, for, as stated in *Amis v. Smith*, 41 U. S., 16 Pet. 303, 311, "interest upon a judgment, secured by positive law, is as much a part of the judgment as if expressed in it."

MR. COMMISSIONER POORMAN prepared the opinion for the court.

In this action judgment was entered for the plaintiff and against the defendants on the 3d day of December, 1898. On the 24th day of March, 1902, the defendant Coram paid to the plaintiff on account of said judgment the full amount of the principal sum thereof, with interest thereon at the rate of 10 per cent. per annum until the 28th day of February, 1899, and at the rate of 8 per cent. per annum from that date until the date of payment. The plaintiff acknowledged partial satisfaction of the judgment, and the appellant proceeded by motion as provided by Section 1201, Code of Civil Procedure, for an

order requiring the plaintiff to satisfy the judgment in full. It was stipulated that, if the plaintiff was only entitled to collect interest on said judgment at the rate of 8 per cent. per annum from the 28th day of February, 1899, said judgment was paid in full; otherwise there was a balance due. This motion was overruled. The appeal is from the order of the court overruling the motion.

The error assigned in this case is that the court erred in deciding that the judgment had not been paid in full and in overruling defendant's motion. It appears from the statement and the stipulation that the full amount of the judgment, with interest thereon at the rate of 10 per cent. until the 28th of February, 1899, and at the rate of 8 per cent. per annum thereafter has been paid. The question presented is whether the Act of the legislature approved February 28, 1899, reducing the rate of interest from 10 per cent. per annum to 8 per cent. per annum, relates to and affects the interest due on this judgment. Section 2588, Civil Code, in force at the time this judgment was rendered, provided that "interest is payable on judgments recovered in the courts of this state at the rate of ten per cent. per annum, and no greater rate, but such interest must not be compounded in any manner or form." This section of the statute was amended by an Act approved February 28, 1899 (Laws of 1899, p. 125), so as to read as follows: "Interest is payable on judgments recovered in the courts of this state at the rate of eight per cent. per annum, and no greater rate, but such interest must not be compounded in any manner or form." This amendatory Act further provides: "Sec. 2. All Acts and parts of Acts in conflict herewith are hereby repealed." "Sec. 3. This Act shall take effect and be in full force from and after its approval."

A judgment in a civil case is a judicial determination of rights existing between parties, or by one party and against the other. It does not create any new rights. It only defines and determines what rights already exist. The right to have a judgment enforced is not inherent in the judgment itself. This

right and authority come from other provisions of law. The judgment is itself a creation of law. It bears no interest unless granted by legislative enactment. It is in the nature of a contract, but is not a contract within the meaning of Section 10, Article I, of the Constitution of the United States, and Section 11, Article III, of the Constitution of the State of Montana. It lacks the element of consent necessary to a contract. It is *in invitum* as to the losing party. The contract between the parties is voluntarily surrendered and canceled by merger in the judgment, and ceases to exist. It is no longer looked to for any purpose except as evidence supporting the judgment. There is no longer any contract for the payment of either principal or interest. A party is not entitled to interest merely because he has a judgment, but solely because the legislature, in its discretion, has said he may charge interest. It is an arbitrary right. Parties appealing to the law can take only what the law awards them. It may be true that parties entering into contracts or appealing to the courts have in mind the fact that any judgment obtained will draw interest at the rate then fixed by the legislature. It is likewise true that they have notice of the inherent power of the legislature to change this rate, or to annul it altogether, and such enactments are not retroactive or retrospective so long as they do not interfere with the collection of interest already accrued. Laws changing the rate of interest apply to accounts with respect to which no agreement exists as to interest. Then why do they not apply to judgments when a judgment is not a contract, and the interest thereon is not the result of agreement between the parties? The rate of interest is fixed by the legislature without reference to the contract on which the action is founded, and without regard to the will or assent of the parties to the action. The judgment creditor is entitled to the interest prescribed by law during the judgment debtor's default in payment. "Where the transaction is not based upon any assent of parties, it cannot be said that any faith is pledged with respect to it, and no cause arises for the operation of the constitutional prohibition." This law now

under consideration is a general law. A citizen can have no vested right in a general law which can preclude its amendment or repeal, and there is no implied promise on the part of the state to protect its citizens against incidental injury occasioned by changes in the law. (Cooley's Constitutional Limitations (6th Ed.), 343.)

In the case of *Morley v. Lake Shore Railway Co.*, 146 U. S. on page 169, 13 Sup. Ct. 57, 36 L. Ed. 925, the Supreme Court of the United States, following the decision in *O'Brien v. Young et al.*, 95 N. Y. 428, 47 Am. Rep. 64, in considering the same question here under discussion, uses this language: "It is contended * * * that the judgment is itself a contract, and includes within the scope of its obligation the duty to pay interest thereon. As we have seen, it is doubtless the duty of the defendant to pay the interest that shall accrue on the judgment if such interest be prescribed by statute; but such duty is created by the statute, and not by the agreement of the parties, and the judgment is not itself a contract within the meaning of the constitutional provision invoked by the plaintiff in error. The most important elements of a contract are wanting. There is no *aggregatio mentium*. The defendant has not voluntarily assented or promised to pay. 'A judgment is in no sense a contract or agreement between the parties.'" The court then holds that a legislative enactment reducing interest on all judgments applied to a judgment then existing.

The Supreme Court of Wyoming, in the case of *Wyoming National Bank v. Brown*, 7 Wyoming, on page 502 (53 Pac. on page 292, 61 Pac. 465, 75 Am. St. Rep. on page 939), says: "An act reducing the rate of interest which judgments shall bear, passed after the rendition of the judgment, is a conclusive determination by the legislature that the damages accruing to the judgment creditor by being deprived of the use of the amount due are measured by a lower rate of interest during the period subsequent to the taking effect of the act than from the rendition of the judgment up to that time. If this view is correct, the plaintiff in this case has received all damages which

accrued while its judgment remained unpaid, and none of its rights have been destroyed or interfered with by legislation. The defendants' obligation to pay interest being simply that which the law imposed, they discharged that obligation by paying what the law exacted."

In the case of *Palmer et al. v. Laberee et al.*, 23 Wash. 409, 63 Pac. 220, the supreme court holds that a law reducing the rate of interest on judgments applies to judgments rendered prior to the passage of the Act and then existing.

Where the contract between the parties provides that interest shall be computed at a certain rate until payment is made, a question might arise not presented by the record in this case, and on which no opinion is here expressed.

We have examined the cases cited by respondent as modifying the decision in the *Morley Case*, and find that the same are not inconsistent with the doctrine announced in that case.

The principles involved in this case are so thoroughly discussed in the cases cited that further comment here is unnecessary. We are of the opinion that the Act of the legislature of February 28, 1899, reducing interest on all judgments, applies from the date of its approval to this judgment, and that the court erred in overruling defendant's motion; and that, inasmuch as the stipulation and record show that the full amount due on this judgment has been paid, this cause should be remanded to the district court, with directions to set aside the order made overruling defendant's motion, and to enter an order sustaining said motion.

PER CURIAM.—For the reasons given in the foregoing opinion, it is ordered that this cause be remanded to the district court, with directions to that court to set aside the order heretofore made overruling the defendant's motion for an order requiring the plaintiff to satisfy the judgment in full, and to enter an order sustaining said motion.

CONLEY, RESPONDENT, v. DUNN, APPELLANT.

(No. 1,579.)

(Submitted May 15, 1903. Decided June 1, 1903.)

*Replevin—Judgment, Verdict and Complaint—Conformity—
Appeal.*

Where, in an action in claim and delivery, the judgment contains a description of the property different from that found in either the complaint or the verdict, the judgment will, on appeal, be reversed.

Appeal from District Court, Carbon County; Frank Henry, Judge.

ACTION by Sena Conley against John Dunn. Verdict and judgment for plaintiff; from which judgment and from an order denying a new trial, defendant appeals. Judgment reversed.

Mr. George W. Pierson, and Mr. George H. Bailey, for Appellant.

MR. COMMISSIONER POORMAN prepared the opinion for the court.

This is an action in claim and delivery. Verdict and judgment for plaintiff, from which judgment, and the order of the court overruling the defendant's motion for a new trial, this appeal is prosecuted.

The plaintiff, in her complaint, alleges that she "was the owner and entitled to the possession, and was in the possession," of "six cows branded G U Y on the right ribs and E—6 on the left hip; five cows branded W A on the right ribs and E—6 on the left ribs; one cow branded E—6 on the left ribs hip; all of said cattle of the value of \$40 each; eight yearling heifers and steers branded E—6 on the left hip, of the value of \$25

each; six calves branded E—6 on the left hip; and two unbranded calves, of the value of \$18 each; one span of work horses, each animal branded V on the left shoulder, valued at \$120; one gelding branded N on the left shoulder, of the value of \$40." The answer filed denies the ownership and right of possession of the plaintiff, sets up title in a third party, and claims justification for seizing the property under the terms of a chattel mortgage executed by such third party; the defendant being at the time sheriff of the county where the property was seized and the action tried. A trial by jury was had, and the following verdict returned: "We, the jury in the above-entitled action, find the issues for the plaintiff, for the return of five cows branded W. A. on right ribs, and E—6 on left hip; one cow branded E—6 on left hip; one calf unbranded; one gelding branded N. on left shoulder; 6 yearlings branded E—6 on left hip; 6 cows branded G. U. Y. on right ribs and E—6 on left hip; the property described in the complaint; and, in case a delivery cannot be had, then for the sum of \$728.32, the value thereof." The judgment entered contains what purports to be a copy of the verdict, and further on contains this statement: "It is ordered adjudged and decreed that the defendant return to the plaintiff the above-entitled property, or, in case said return cannot be made," etc.

The description of the property as given in the complaint differs from that stated in the copy of the verdict found in the record, while the copy of the verdict incorporated in the judgment contains a description different from that found in either the complaint or the former copy of the verdict. As to some of the property these descriptions are the same, but as to other items there is a radical difference. In the complaint appears this description: "Five cows branded W A on the right ribs and E—6 on the left ribs." In the verdict the description reads, "5 cows branded W. A. on right ribs and E—6 on left hip." The judgment reads, "5 cows branded E—6 on right ribs and E—6 on left hip." The pleadings do not contain any reference to cattle branded E—6 on right ribs and E—6 on left

hip. These various descriptions may or may not refer to the same animals. A clerical error may have been committed in making the copies. We cannot indulge in presumptions in those matters. The record before us imports verity, and we are bound thereby. The verdict does not support the judgment, and the complaint does not support either verdict or judgment. For this reason the judgment of the district court should be reversed.

It is contended that the verdict is insufficient, that it is not responsive to the issues, that it does not find upon the question of ownership as to the property awarded to plaintiff, that it contains no finding as to either ownership or right of possession of the property not awarded to plaintiff, and that it is in the alternative. As it is not probable that these alleged defects will appear upon another trial, it is not deemed necessary to pass upon them here.

We recommend that the judgment appealed from be reversed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the judgment and order appealed from are reversed, and the cause remanded, with directions to the district court to grant the defendant a new trial.

NELSON, RESPONDENT, v. GREAT NORTHERN RAIL-
WAY COMPANY, APPELLANT.

(No. 1,522.)

(Submitted April 15, 1903. Decided June 1, 1903.)

*Carriers—Transportation of Stock—Delay—Liability—Com-
plaint—Allegations—Nature of Action—Common-Law
Duties—Limitations by Special Contract—Validity—Evi-
dence—Burden of Proof—Instructions—Measure of Lia-
bility—Double Damages—Verdict—Conflicting Evidence—
Review.*

28	297
30	267
30	316
30	392
30	415
28	297
29	36
29	144
29	506
28	297
35	79
36	311

28	297
37	21
28	297
41	334
41	335
41	492
28	297
40	412

1. Actions on contracts and actions in tort cannot be united.
2. The complaint in an action against a carrier for violations of a special contract of shipment must set out the contract either in substance or in *hæc verba*, and must declare upon it.
3. The complaint in an action in tort against a carrier for a breach of its common-law duties in the shipment of goods must allege facts which will show, not only the rights of the shipper, but the duties of the carrier as well.
4. A complaint, in an action brought to recover damages claimed to have been sustained by the plaintiff as a shipper of live stock over defendant's railroad, examined, and *held* to state a cause of action in tort.
5. Where a common carrier, accepting property for transportation, commits a breach of its common-law duties, the shipper may maintain an action in tort therefor, though the carrier receives the property under a special contract limiting its liability; the carrier in accepting the shipment accepting it with the obligations imposed by law, and the special contract merely constituting a defense in so far as the exemptions from liability which it creates are valid must be pleaded as a defense, and the burden of proof rests on the defendant to establish it.
6. Where the special contract entered into between the shipper and the carrier (a railroad company) provides that the shipper shall attend, water, and feed the live stock shipped, such contract relieves the carrier from all duty and obligation respecting such matters, but does not relieve it of the duty imposed by law of properly handling its trains, and of affording reasonable facilities for enabling the shipper to give the live stock proper care and attention.
7. In tort against a common carrier for delay in the transportation of sheep the shipper could show the condition of the sheep at the time of their shipment, and, whether evidence of the treatment and food received by the sheep immediately prior to the shipment was a correct way to show this condition or not, defendant was not prejudiced by such evidence, admitted without objection, where the court charged the jury not to consider any damages sustained prior to the loading of the sheep on the carrier's cars.
8. Where a contract for the transportation of sheep by a common carrier fixes a valuation on the sheep per head, the measure of the liability of the carrier for damages resulting from a breach of its duties causing injury to the sheep is the amount of the actual damage not exceeding the stipulated valuation per head.
9. Under Civil Code, Sections 2876, 2877, 2912, a common carrier cannot by special contract limit its liability for delay in the transportation of property arising from its own or its servants' negligence.
10. Where a statute is taken from another state it is taken subject to the interpretation placed upon it by the courts of that state, and this doctrine applies when a portion of the common law is enacted as a part of the statute.
11. Where property delivered to a carrier for transportation is injured as a result of negligent delay on the carrier's part, the shipper, free from negligence on his part, is entitled to compensation for the damages sustained by reason of such delay.
12. Where animals delivered to a common carrier for transportation are injured during the transportation, and there is no evidence to show that the animals were injured from an inherent want of vitality, or by reason of injuries inflicted on each other, or by unavoidable accident, the carrier has the burden of proving that the injuries were occasioned by some other cause than its own negligence, though the shipper accompanies the shipment.
13. In an action against a common carrier for injuries to sheep transported by it caused by its negligent delay in their transportation and by exposing

them to severe weather, defendant's witnesses testified that they informed plaintiff at the time of shipment that the worst blizzard ever known was prevailing along its line of road. Plaintiff denied receiving this information. *Held*, that the evidence warranted an instruction that if the carrier, at the time of accepting the shipment, knew of the storm along its line, and did not inform plaintiff thereof, it could not excuse the delay by showing that its track was obstructed by snow blockades.

14. A common carrier receiving property for transportation with knowledge of the existence of an obstruction on its road, and without informing the shipper, cannot offer the obstruction as an excuse for not making a prompt delivery thereof, though the obstruction is the act of God; and it is bound to take notice of the signs of approaching danger liable to create obstructions, if any are known to it.
15. A special contract with a railroad company for the transportation of property required that in case of loss or claim for damages the shipper should give notice in writing to it. The railroad received information of the injury to the property by letter, and the railroad department called for information regarding the same shortly after the shipment was made. *Held*, a sufficient notice when not objected to.
10. Where the evidence is conflicting, the verdict, or finding, will not be disturbed.
17. In an action against a common carrier for injuries to sheep transported by it, caused by negligent delay in their transportation and by exposing them to severe weather, the shipper testified that there was a shrinkage of the sheep during the transportation of 33 pounds per head, or 25 pounds in excess of a reasonable shrinkage; that it was necessary to feed them four days at the place of delivery before selling them, while feeding them once only might have been necessary if they had been delivered in good condition; that the cost of so feeding them was \$240, and the cost of one feeding was \$40; that the sheep were weighed before and after they were fed this extra \$200 worth of food. It did not appear which of these weights was taken as the basis of calculation in ascertaining the shrinkage. *Held*, that an instruction authorizing a recovery of the expenses for feeding rendered necessary by reason of the condition of the sheep at the place of delivery was erroneous, as allowing double damages.

Appeal from District Court, Lewis and Clarke County; H. C. Smith, Judge.

ACTION by H. H. Nelson against the Great Northern Railway Company. From a judgment for plaintiff, and from an order overruling defendant's motion for a new trial, defendant appeals. Reversed, unless plaintiff consents to modification by deducting certain sum from amount recovered.

Mr. I. Parker Veazey, for Appellant.

As to the nature of the complaint, and the cause of action set up therein, see Hutchinson on Carriers, Secs. 738-747; *City of Great Falls v. Hanks*, 21 Mont. 83; *Stark v. Wellman*, 96

Cal. 400; *Sanford v. Am. Dist. Tel. Co.*, 34 N. Y. Supp. 144; *Rothschild v. Grand Trunk Ry. Co.*, 10 N. Y. Supp. 36.

In the court below the plaintiff broadly contended that it was never necessary for the shipper to declare in the first instance upon the contract of shipment; that the shipper might always count upon a breach of duty imposed by law; that if any actual contract were pleaded and shown by the defendant to exist the same could never defeat the plaintiff's action in such case. It was conceded and so ruled by the court that the plaintiff could not recover contrary to the valid provisions of such contract, when the latter was admitted or proven, but contended that he might recover in so far as upon the merits of the whole transaction he would have been authorized to recover had the contract been set up in the complaint instead of in the answer. This view, as applied to the facts of this case, violates fundamental rules of the law of pleading. It involves an abandonment of the ground of liability upon which the action was rested and the substitution of another therefor. In other words, a departure from fact to fact and from law to law. Every cause of action must be rested upon some duty shown to exist and a breach of the same. Legal identity of the cause of action established by the evidence and that pleaded must be preserved or there is a fatal variance. The substitution of a new ground of liability in point of law for that upon which the complaint is founded is a departure. (*Union Pac. v. Weyler*, 15 Sup. Court Rep. 879.)

A common carrier is ordinarily liable as an insurer. This liability and the extent of it is defined in Section 2910 of our Civil Code. Where the shipper accompanies the shipment the rule of the common law is very well expressed in the case of *St. Louis I. M. & S. Ry. Co. v. Weekly*, 8 S. W. Rep. 140, and the language of Section 2910 shows clearly that there is no intent to abrogate this rule. (*Railroad Co. v. Hedger*, 9 Bush. 645, 651; *Clark v. Railway Co.*, 64 Mo. 441, 448; *Harvey v. Rose*, 26 Ark. 3; *Railway Co. v. Reynolds*, 8 Kan. 623, 641.)

In the case at bar examination of the contract will disclose

that it undertakes to regulate the damages to some extent by fixing the value of the property and establishes a condition precedent to the institution of any suit for the recovery of damages; that it imposes upon the plaintiff the performance of certain duties which are ordinarily imposed by law upon the defendant; that it relieves the defendant from liability as an insurer; and, as I think, that it relieves the defendant from liability for the ordinary negligence of defendant, its agents, servants and employes. (*Hall, Executor, v. Pa. Co.*, 90 Ind. 459, 16 Am. & Eng. R. R. Co., 165; *Bartlett v. P. C. & St. L. Ry. Co.*, 94 Ind. 281; 18 Am. & Eng. R. R. Cases, 549; *Kimball v. Rutland, etc. Ry. Co.*, 26 Vt. 247, 62 Am. Dec. 567; *Newell et al. v. Nicholson et al.*, 17 Mont. 389, 43 Pac. 180; *N. Y. Mfg. Co. v. Ill. Cent. Ry. Co.*, 3 Wallace, 107, Book 18. 70 and 73, U. S.; *Austin v. Manchester, etc. Ry. Co.*, 5 Ency. L. & Eq. 329; Ray, Negligence of Imposed Duties, Freight Carriers, p. 95-96; *Latham v. Rutley*, 2 Barn. & C. 20; *Austin v. Manchester S. & L. Co.*, 15 Jur. 670; *Davidson v. Graham*, 2 Ohio St. 131; *Ferguson v. Cappeau*, 6 Harr. & J. 394; *Stump v. Hutchinson*, 11 Pa. 533; *Indianapolis, etc. R. R. Co. v. Remmey*, 13 Ind. 518; *Jeffersonville, etc. R. R. Co. v. Worland*, 50 Ind. 339; *Hall v. Pa. Co.*, 90 Ind. 459; *Lake Shore, etc. Ry. Co. v. Bennett*, 89 Ind. 457.)

The stipulation in the contract as to value was valid in law and affected the amount of plaintiff's recovery. (*Hart v. Pa. Ry. Co.*, 112 U. S. 331-345; *Pierce v. So. Pac. Ry. Co.*, 52 Pac. 302; *Ells v. St. Louis, etc. Ry. Co.*, 52 Fed. 903.)

The contract stipulation for exemption from damages sustained by delay relieves the carrier from liability for the ordinary negligence of itself or employes. (*Cragin v. N. Y. C. R. R. Co.*, 51 N. Y. 61.)

Even at the common law, where it appears as a fact that the damages were immediately caused by an act of God or the public enemy, there is then no presumption of negligence upon the part of the carrier. Such facts being found, the carrier is not liable unless guilty of negligence, and negligence of the de-

defendant being the gist of the plaintiff's cause of action, it must be established by him. (*Railway Co. v. Reeves*, 10 Wall. 189-190; *Davis v. Wabash, etc. Ry. Co.*, 1 S. W. 327; *St. Louis, etc. Ry. Co. v. Weakly*, 8 S. W. 141.)

Where a special contract is entered into by which the carrier is relieved from its liability as an insurer as to damage occurring through specified causes and the evidence shows the damage to have been sustained by one of the enumerated causes, the burden is upon the shipper to show negligence upon the part of the carrier. (*Lamb et al. v. Camden & Amboy Ry. Co.*, 46 N. Y. 272; *Cochran v. Densmore*, 49 N. Y. 276.)

Instruction number seven violates a rule of practice and is also open to the further objection that it is positively erroneous in its statement of the matters which may be considered by the jury in determining the question of negligence. The instruction is bad because of its comment upon the evidence and the manner in which certain facts, or alleged facts, are culled out from a mass of other facts in the case and given special prominence. (*Wastl v. Montana Union Ry. Co.*, 42 Pac. 773; *Hulburt v. Boaz*, 23 S. W. 447.)

A verdict should have been directed for the defendant for the reason that no compliance on the part of the plaintiff was shown with the stipulation of the contract requiring him to give notice in writing of his claim. Irrespective of the statute the stipulation is perfectly valid at the common law. (*Express Co. v. Caldwell*, 21 Wall. 264; *Sprague v. Mo. Pac. Ry. Co.*, 8 Pac. 465; *Wichita & W. Ry. Co. v. Koch*, 28 Pac. 1013; *Louisville, etc. Ry. Co. v. Widman*, 37 N. E. 554; *Express Co. v. Harris*, 51 Ind. 127; *Insurance Co. v. Duke*, 43 Ind. 418; *Railway Co. v. Morris*, 16 Am. Eng. R. Cases, 259.)

Mr. G. M. Nelson, Mr. W. G. Downing, and Mr. H. G. McIntire, for Respondent.

The complaint in this action is one on the case. (*Bowers v. R. & D. R. R. Co.*, 107 N. C. 721; *Rideout v. M. L. S. & W. R. Co.*, 81 Wis. 237; *Brown v. C. M. & St. P. R. Co.*, 54 Wis.

342; *Nelson v. Harrington*, 72 Wis. 591; *Wood v. C. M. & St. P. Ry. Co.*, 32 Wis. 398; *Smith v. C. & N. W. Ry. Co.*, 49 Wis. 443; *Stockton v. Bishop*, 45 U. S. 155; *Flynn v. H. R. K. R. Co.*, 6 How. Pr. 308; *Bank of Orange v. Brown*, 3 Wend. 158; *Heil v. St. L. I. M. & S. Ry. Co.*, 16 Mo. App. 363.)

There are certain limitations and exceptions to defendant's common-law liability. If it desires to avail itself of them it must plead and prove them in defense. The special contract merely extends these limitations and exceptions, which it must take advantage of in the same manner as it takes advantage of those created for it by the law itself. The fact that it has created them, instead of the law, does not change the rule. (*Hutchinson on Carriers*, 2d Ed., Secs. 748, 749; 3 Ency. Pl. & Pr. p. 823; *Clark v. S. L. K. C. & N. W. Ry. Co.*, 64 Mo. 440; *M. St. P. & S. S. M. Ry. Co. v. Home Ins. Co.*, 64 Minn. 61; *Nicoll v. E. T. V. & G. Ry. Co.*, 89 Ga. 260; *Witting v. St. L. & S. F. Ry. Co.*, 28 Mo. App. 110; *Oxley v. St. L. etc. Ry. Co.*, 65 Mo. 629; *W. St. L. etc. Ry. Co. v. Pratt*, 15 Ill. App. 177; *Coles v. Louisville, etc. Ry. Co.*, 41 Ill. App. 606; *Arnold v. I. C. R. R. Co.*, 83 Ill. 273; *I. C. R. R. Co. v. Phellps*, 4 Ill. App. 238; *W. St. L. & P. Ry. Co. v. McCasland*, 11 Ill. App. 491; *Wiggins Ferry Co. v. Blakeman*, 54 Ill. 201; *City of Champagne, v. McMurray*, 76 Ill. 358; *W. St. L. & P. Ry. Co. v. Black*, 11 Ill. App. 465; *Mechalitsche v. Wells Fargo Co.*, 118 Cal. 687.)

"Where the stipulation limits the liability of the carrier in any event to a named sum, in case of loss of the property shipped, and no loss occurs, but the property is injured, the shipper is entitled to recover damages for the injury up to the amount named, although the injured property may still be valuable. The effect of the stipulation is not to fix a limit in case of loss and a proportionate limit in case of injury, but to fix an amount which shall be the limit of recovery, whether for loss or for injury." (5 Am. & Eng. Ency. of Law, 2d Ed. p. 335; *Sparnes v. Railroad*, 91 Tenn. 516; *Hart v. Pa. R. R. Co.*, 112 U. S. 331; *Shea v. M. St. P. etc. Ry. Co.*, 63 Minn. 228.)

"The rule is unquestioned that it is as much a part of the common carrier's duty to carry and deliver with reasonable promptness, as it is to receive and carry." (5 Am. & Eng. Ency. of Law, 2d Ed. 244.) "A reasonable time is such a time as a man of ordinary diligence and dispatch would require for the transportation of his own goods under similar circumstances." (5 Am. & Eng. Ency. of Law, 2d Ed. 246.) "The question as to what is such reasonable time is, therefore, under ordinary circumstances, for the jury to determine." (5 Am. & Eng. Ency. of Law, 2d Ed. 247.) "The character of the property being carried is an important circumstance in determining what is a reasonable time, and owing to the harmful results likely to follow the tardy transportation of cattle or other live stock, carriers of such property are held to a stricter measure of duty than carriers of merchandise." (5 Am. & Eng. Ency. of Law, 2d Ed. 450.) "The general rule is that a carrier cannot limit his liability for delay, except by special contract with the shipper, and that in no event can it limit its liability for delay resulting from its own negligence." (5 Am. & Eng. Ency. of Law, 2d Ed. 258; *A. T. & S. F. Ry. Co. v. Dittman*, 3 Kan. App. 459; *Branch v. W. R. R. Co.*, 88 N. C. 573; *Pierce v. S. P. Ry. Co.*, 47 Pac. Rep. 876; *Leonard v. Chicago R. R. Co.*, 54 Mo. App. 293.)

The rule that the carrier may not limit his liability for delay arising from his negligence follows from the general rule that the carrier may not limit his liability as against his negligence of any description,—a rule which prevails in the federal and in all the state courts, except those of New York (which alone permits the carrier to limit his liability against his own negligence), and of Illinois and Wisconsin, which permit the carrier to limit his liability except against his gross negligence. (5 Am. & Eng. Ency. of Law, 2d Ed. 288, 307, 308, 313 and 315.)

The common carrier may not by contract confine his liability to damages resulting from his gross negligence, or from his willful negligence. (5 Am. & Eng. Ency. of Law, 2d Ed. 459;

N. Y. R. R. v. Lockwood, 17 Wall. 357; *Shriver v. Sioux City R. R. Co.*, 24 Minn. 506; *Moulton v. St. P. Ry. Co.*, 31 Minn. 85; *Hutchinson on Carriers*, Secs 260 and 263; *Alabama R. R. v. Thomas*, 83 Ala. 343; *Railway Co. v. Harris*, 67 Tex. 166; *Root v. Ry. Co.*, 83 Hun. 111; *Orby v. Ry. Co.*, 65 Mo. 632; *Read v. Ry. Co.*, 60 Mo. 199.)

Defendant suggests that a presumption of negligence on its part cannot obtain in this case, as that only applies in cases where the defendant has complete control of the shipment, while in this case the shipper was to accompany and control it. This is not the law. (*A. T. & S. F. Ry. Co. v. Dittman*, 3 Kan. App. 459; *Leonard v. C. R. R. Co.*, 54 Mo. App. 293.)

The court did not err in giving instruction No. 6¾. (*Hutchinson on Carriers*, 2d Ed. Secs. 292, 310, 311; 5 Am. & Eng. Ency. of Law, 2d Ed. page 430; *Corbett v. St. P. M. & O. Ry. Co.*, 86 Wis. 82; *Maghee v. C. & A. T. Co.*, 45 N. Y. 512; *McGraw v. Baltimore R. R. Co.*, 18 W. Va. 361; *Hewitt v. Chicago R. Co.*, 63 Ia. 611; *Lamont v. R. R. Co.*, 9 Heisk (Tenn.), 58; *Fox v. R. R. Co.*, 148 Mass. 220; 5 Am. & Eng. Ency. of Law, 2d Ed. 255; *Express Co. v. Jackson*, 92 Tenn. 326.)

Defendant's contention that plaintiff is not entitled to recover by reason of failure to give notice in writing of his claim for the injuries complained of, is not well founded. (5 Am. & Eng. Ency. of Law, 2d Ed. 324, 326; *Westcott v. Fargo*, 61 N. Y. 542; *Central Co. v. Pickett*, 87 Ga. 734; *Wabash Ry. v. Brown*, 152 Ill. 484; *Hess v. N. P. Ry.*, 40 Mo. App. 202; *B. & O. R. v. Cooper*, 66 Miss. 558; *Kansas R. v. Ayers*, 63 Ark. 331; *Owen v. Louisville R.*, 87 Ky. 626.)

MR. COMMISSIONER POORMAN prepared the opinion for the court.

This action is brought to recover damages claimed to have been sustained by the plaintiff as a shipper of live stock over defendant's line of railroad. The pleadings filed by the parties

are substantially as follows, in so far as it is necessary to consider the same and the questions raised in this case:

The first three allegations of the complaint are to the effect: That plaintiff is a resident of Montana. That defendant is a corporation duly incorporated, and was at the time operating a line of railroad from the city of St. Paul westward through the states of Dakota and Montana into the city of Seattle. That the defendant was a common carrier, transporting merchandise and live stock, for hire, over said line of road, and over other lines of road between the city of St. Paul, Minn., and Chicago, Ill. (4) That it was the duty of defendant to provide suitable cars for the transportation of live stock when requested so to do. (5) That prior to the 16th day of November, 1896, the defendant promised, as such common carrier, to provide cars and to transport for plaintiff from Culbertson, Mont., to Chicago, Ill., 2,889 head of sheep on said day. (6) That at Culbertson, on November 16, 1896, the plaintiff delivered to defendant the said sheep, and that the same were in sound and marketable condition; that the defendant then and there received the same as such common carrier, and promised, for a certain reward, to transport the same to the city of Chicago. (7) That defendant, as such common carrier, promised to transport the said sheep with all due and reasonable speed, and within the usual and customary time required for such transportation. (8) That it was the duty of defendant, as such common carrier, to complete said transportation within four days, and that the same could have been done with the exercise of due and reasonable diligence. (9) That defendant, in disregard of its duties as such common carrier, willfully, wrongfully, and negligently kept and detained said sheep at said Culbertson until the 26th day of November, 1896. (10) That on November 26, 1896, a violent storm was prevailing along the line of said railway, which was known to the defendant; that it was then known to the defendant that it could not safely transport and carry said sheep, and that defendant's line of road was obstructed and blockaded; that defendant willfully, negligently,

and wrongfully caused the said sheep to be loaded into its cars at Culbertson, of which the plaintiff had no notice or knowledge. (11) That defendant, disregarding its duties as such common carrier, willfully, wrongfully negligently, and carelessly delayed the said sheep and the train from time to time along said route, and wrongfully and negligently exposed the same to severe cold weather, and negligently refused and failed to protect said sheep. (12) Said sheep, being so improperly and unnecessarily delayed by the negligent acts of defendant, never reached said city of Chicago, but were delivered to plaintiff at South St. Paul. (13) That by reason of the careless and negligent acts of defendant 40 of said sheep died, and that they were worth \$3.15 per head at the point of shipment. (14) That the balance of said sheep, by reason of the negligence of defendant, suffered very great injury, and were reduced in value, to the plaintiff's damage in the sum of \$4,052.67. (15) That plaintiff was damaged in the sum of \$396 by reason of the extra care and expenses in caring for said sheep, and that said expense was occasioned solely by the negligence of the defendant. (16) That by reason of the willful, wrongful, and negligent omissions of defendant, plaintiff was damaged in the sum of \$4,574.67. Plaintiff prays judgment for said sum.

To this complaint the defendant filed an answer admitting the allegations of the first three paragraphs, and denying *in toto* paragraphs 5, 6, 7, 8 and 9. Defendant further admitted the occurrence of the storm referred to in the complaint, and that its line of road was obstructed between Culbertson and St. Paul, but alleges that the same was known to plaintiff at the time said sheep were loaded; denies that defendant loaded the sheep, but alleges same were loaded by plaintiff. The special contract is then set up in the answer entered into between the parties on the day of shipment, providing in substance as follows: Admitting the receipt of the sheep by the defendant upon the terms and conditions of this contract, and that the same were accepted by the shipper as just and reasonable in consideration that the first party will transport the live stock

at the rate named, and furnish transportation as provided in the regulations. (1) "That said railway company shall not be liable for the loss or death of, or for any injuries received by, any such stock, unless the same is immediately caused by the actionable negligence of said company, its agents, servants, or employees." (2) That said party agrees to load, unload, and reload at his own expense and risk, and to feed, water and tend the same at his own expense and risk, while in the stockyards of defendant awaiting shipment, or while the cars are at feeding or transfer points. (3) Said second party assumes all risk of loss resulting from the failure of defendant to water said sheep when such failure is caused by the freezing of water pipes, and assumes all risk of damage from any failure in feeding, watering, or tending said stock, of whatsoever nature or kind, not resulting from negligence of defendant. (5) Said second party accepts the cars provided for transporting said stock as being sufficient therefor, and assumes all risk of damage by reason of delay in such transportation not resulting from the willful negligence of the said railway company or its agents. (6) In case of loss or claim for damage said second party shall give notice in writing to defendant within fifteen days after such loss or damage has occurred. (7) "And it is hereby further agreed that the value of the live stock so transported under this contract shall not exceed the following mentioned sums: Each sheep two and 50-100 dollars; such valuation being that whereon the rate of compensation to the railway company for its services and risk connected with said property is based." (8) Such values being the true values of such live stock, and this contract being entered into relying upon such values so given, as being the just and true values. (10) Provides that defendant shall not be liable beyond the line of its own railway, and that this contract shall inure to the benefit of each and every carrier beyond the route of said first party; and that shippers are required to state actual value at the time and place of shipment. In case of loss the company will only be liable for the value so given. Defendant further alleges that this was the only con-

tract entered into relative to the shipment of said stock, and that the same was accepted under the terms of said contract; but that it was finally agreed that the sheep should be delivered to plaintiff at South St. Paul, instead of at Chicago. Defendant further alleged that it fully complied with and performed all the terms and conditions of said contract, that it was not guilty of negligence in any manner, and that the injury and death of said sheep were caused by the negligence of the plaintiff. Defendant then sets up a counterclaim of \$160 as advance charges for hay alleged to have been furnished in the feeding of said sheep. Defendant further alleged that in pursuance of said contract it furnished free transportation for four men to accompany said sheep and to care for the same.

To this answer the plaintiff filed a replication denying the facts therein stated.

At the trial of the case special questions were submitted to the jury, on which they found: (a) That the injury to the sheep in question was attributable to the fact that they were exposed to cold and stormy weather. (b) That said injury was caused by such exposure. (c) That the same was attributable to the negligence of defendant. (d) That defendant did not notify plaintiff of the prevalence of a storm along the line of its railway. (e) That when the sheep reached South St. Paul they had not shrunk or suffered materially from lack of food. (f) That the train dispatcher was guilty of gross negligence in delaying the train at Williston.

A verdict was rendered for plaintiff for \$2,424.67. Judgment was entered thereon. From this judgment and the order of the court overruling defendant's motion for a new trial defendant appeals.

It was established at the trial that plaintiff did load the sheep on the cars at Culbertson, that he did enter into the contract set up in defendant's answer, and that the sheep were turned over to him at South St. Paul with his consent.

1. The trial court held this complaint to be one in tort, rather than on contract, and permitted plaintiff to introduce

evidence to establish a cause of action upon that theory. This the defendant assigns as error, claiming that the complaint sets up a special contract, and that the action is one *ex contractu*, and not *ex delicto*.

This objection strikes at the very foundation of the action, and will be first considered. That actions on contract and actions in tort cannot be united is elementary. The one is based upon the violation of a contract made by the parties thereto; the other is based upon the violation of duties and obligations determined, not from the form or contents of any contract, but from the policy of the law. If this complaint is based upon a private contract, of which the parties, and not the policy of the law, are the authors, this action must fail, for no such private contract was proved. And in this we are considering the complaint alone, and not the subsequent pleadings. In actions by a shipper against a common carrier for violations of a special contract of shipment, it is necessary for the complaint to set out the contract either in substance or in *haec verba*, and to declare upon it. And where the action is in tort, based upon a violation of the carrier's common-law duty, it is still necessary for the plaintiff to state facts which show, not only his rights, but the duties of the carrier, in the premises, before he can complain of any breach of duty on the part of the carrier. Both these forms of action are, in effect, based upon violations of contracts. The one upon the violation of an express contract made by the parties themselves is called an action "*ex contractu*," and where it is sought to combine in the same action charges against the carrier for violations of a special contract and also for violations of his common-law duties, the action is called "*ex delicto quasi ex contractu*." The other form of action, based upon violations of the implied contract declared by law, is called an action "*ex delicto*," or in tort.

It is frequently difficult to determine from an examination of the complaint whether the action is on contract or in tort; that is, whether it is meant to charge the carrier with a violation of the express contract made by the parties, or a violation

of the implied contract made by the law. The statute, in abolishing all forms, and requiring actions to be brought on the "facts constituting the cause of action," have increased, rather than diminished, this difficulty, by removing the guide furnished by the *indicia* of the common-law forms. The implied contract created and declared by law relative to the duties and liabilities of a common carrier is so complete within itself that there is little necessity for any additional contract between the parties, unless the carrier desires to limit his liability; and so usual is it for shippers to rely upon this contract created by law in actions against carriers that it has been held that "tort is the natural and habitual foundation of an action for the breach of the ordinary contract of carriage, and the declaration will be so construed unless the facts of the case clearly show that the plaintiff has elected to sue on the contract." (*Whittenton Mfg. Co. v. Memphis & O. R. P. Co.* (C. C.), 21 Fed. 896, and cases there cited.)

The question here under consideration was discussed at some length in the case of *New Jersey Nav. Co. v. Merchants' Bank*, 6 How. 344, 12 L. Ed. 465, and the general result there reached was that, notwithstanding there was in that case a suit founded upon a special contract of carriage, yet in the very nature of the action it was such that, essentially, whatever its form, it was founded in tort.

In *Bryant v. Herbert*, 3 C. P. Div. 189, the same rules of discrimination were applied in testing the form of an action, but with a contrary result. Justice Hammond, in commenting on the decisions in the last two cases cited, says: "These two cases establish that in solving a question like this we are to look to the requisite nature of the remedy the plaintiff is entitled to on the fact he states, rather than any form his declaration may assume; though, of course, we cannot wholly disregard the form of the declaration." (*Whittenton M. Co. v. M. O. R. P. Co.*, *supra*.)

It has been decided that a mere averment of a promise, or the use of the words "agreed, understood, or promised," does

not make the declaration one in contract; but the averment must be one of promise, and a consideration therefor, to make it a count on contract. (*Whittenton M. Co. v. M. O. R. P. Co.*, *supra*; 3 Enc. P. & P. 822.)

There may be an averment of a consideration for assuming the duty imposed by law as a matter of inducement, and as showing a compliance by the shipper with his duty in this regard, for the carrier is under no obligation to transport goods gratuitously. Wherever the gravamen of the complaint is solely for a neglect of duty imposed upon the carrier by law, the action is in tort. And even where there is a special contract varying and limiting the carrier's common-law liability, the plaintiff has an election to bring his action on the contract or to sue in tort for damages for negligence. (3 Enc. P. & P. 821, 822, and cases cited.)

There can be no uncertainty as to the cause of action set forth in this complaint. It is based upon a violation of the defendant's duties as a common carrier. The complaint is given in substance in the statement of facts, and, when examined in the light of the authorities herein cited, we believe that but one conclusion can be reached. Complaints similarly drawn have been held to state causes of action *ex delicto* in the following cases: *Bowers v. R. & D. R. R. Co.*, 107 N. C. 721, 12 S. E. 452; *Rideout v. M., L. S. & W. R. Co.*, 81 Wis. 237, 51 N. W. 439; *Nelson v. Harrington*, 72 Wis. 591, 40 N. W. 228, 1 L. R. A. 719, 7 Am. St. Rep. 900; *Smith v. C. & N. W. Ry. Co.*, 49 Wis. 443, 5 N. W. 240; *Stockton v. Bishop*, 4 How. 155, 11 L. Ed. 918; *Flynn v. H. R. R. Co.*, 6 How. Prac. 308.

2. The appellant claims that the court erred in not sustaining its contention that there is a variance between the cause of action pleaded and that proved. This contention is based upon the theory that the defendant, being charged with liability growing out of a breach of its common-law duties, and the court having found that the special contract pleaded in defendant's answer covering this shipment was entered into by the parties, the plaintiff cannot recover, as to permit plaintiff to do so would

constitute a material variance between the cause of action pleaded and the one proved; that it would be a departure from fact to fact and from law to law—that is, that the plaintiff, in recovering, would be recovering upon the special contract set up in the answer, instead of the implied one pleaded in the complaint. As before stated, the policy of the law declares a contract between the shipper and carrier which is complete within itself. This contract, thus declared, is ever present. True, it may be modified by special agreement, but modified only. It cannot be wholly annulled. It is the policy of the law, growing out of the character and necessity of the employment of the common carrier. It is equally binding upon the shipper and carrier, and cannot be modified except as permitted by provisions of law. Ordinarily, a written contract between parties includes the entire subject-matter, and furnishes the whole measure of liability and obligation upon each side. But this is not necessarily so in the case of a contract between a shipper and a carrier, and it is seldom that a written contract can cover the whole subject-matter of their respective rights and obligations, for the reason that duties are imposed by law upon the carrier which cannot be affected by stipulation. The special contract may touch upon only a few of the grounds upon which an action may be based, and such is the case with the special contract set out in the answer. It does not, if such could be done, change or attempt to change the relation from common carrier to private carrier. Suppose the special contract entered into between the shipper and the carrier provides that the shipper shall attend, water, and feed the stock. This relieves the carrier from all duty and obligation respecting these particular matters, but does not relieve it of the duty imposed by law of properly handling its trains, and of affording reasonable facilities for enabling the shipper to give the stock proper care and attention. The carrier, through its negligence, either ordinary or gross, does not handle its trains in a proper manner, does not afford these facilities, and damage results therefrom. In such a case, must the shipper bring his action on the special contract? Can he maintain an

action on the contract for the violation of duties with respect to which the contract is wholly silent? The answer to this latter question is obvious. The shipper could not maintain an action for the violation of certain terms and provisions of a contract unless those terms and provisions were a part of the contract, and under the theory advanced by the appellant he could not maintain an action on the case for the reason that a special contract existed. He would, therefore, have no redress. Every cause of action must rest upon some duty shown to exist and a breach of the same. Where the action is based upon the violation of the terms of a special contract, defendant cannot be held liable for any acts of commission or omission not therein incorporated or included. Consequently there could be no breach of duty. To give the shipper any right of action in such a case, it would be necessary that the special contract be to that extent ignored. The carrier must be charged with the violation, not of the terms of a special contract, but with the violation of the duties imposed upon it by law. A carrier, in accepting shipments, always accepts them subject to the liabilities imposed by law. The only way in which it can at all vary or limit this liability is by special contract. The effect of the special contract is, therefore, merely to create and define certain cases and conditions under which its full common-law liability shall not attach. The special contract is the evidence of such exception, and to the extent to which it is valid constitutes a defense, and as such must, therefore, be pleaded as a defense; the burden of proof resting on the defendant to establish it. (*Atchison, Topeka & S. F. Railroad Co. v. Ditmars*, 3 Kan. App. 459, 43 Pac. 833.) The plaintiff consequently recovers from the defendant, if recovery is had, by reason of its common-law liability as a carrier, notwithstanding the special contract, unless the defendant shall, as a matter of defense, show that it has escaped its common-law liability under and by reason of the contract.

The special contract is pleaded as a defense, and not in bar. We are aware that the decisions on this question are somewhat

at variance, but believe the better rule to be that the existence of a special contract for the shipment of live stock, with stipulations therein exempting the carrier from certain liabilities, is no obstacle to the maintenance of an action in tort, based upon the violations of the carrier's common-law liabilities, and that the plaintiff has an election to bring his action on the contract or in tort for damages arising from a violation of the carrier's duties. (*Nicoll v. East. Tenn. etc. Ry. Co.*, 89 Ga. 260, 15 S. E. 309; 3 Enc. P. & P. 823; *Witting v. St. Louis & S. F. Ry. Co.*, 28 Mo. App. 110; *Coles & Co. v. Louisville, etc. Railroad Co.*, 41 Ill. App. 607; *Arnold v. I. C. R. R. Co.*, 83 Ill. 273, 25 Am. Rep. 386; *Clark v. St. Louis, etc. Ry. Co.*, 64 Mo. 440; *Minneapolis, St. P. etc. Ry. Co. v. Home Ins. Co.*, 64 Minn. 61, 66 N. W. 132; *Hutchinson, Carriers*, Secs. 748, 749; *City of Champaign v. McMurray*, 76 Ill. 358; *Michalitschke v. Wells, Fargo & Co.*, 118 Cal. 687, 50 Pac. 847.)

3. Defendant next assigns as error the refusal to give its requested instructions Nos. 1, 2, 3, and 4. Evidence was admitted relative to the agreement or duty of the defendant to provide cars on the 16th day of November, 1896, for transporting the sheep, and as to the care and feed of the sheep at Culbertson between that day and the time of shipment on November 26th; and also as to the conversation had between the plaintiff and one J. W. Donovan, train dispatcher at Great Falls. This testimony was permitted to go in without objection, until the plaintiff, then testifying as a witness in his own behalf, was asked as to whether, while at Culbertson, he was put to any expense in connection with the keeping and care of the sheep that would not have been incurred had the shipment been made as soon as they were delivered there. This evidence was objected to, and the court then held the action to be in tort, and that defendant was not liable for any loss or damage prior to the day when the sheep were loaded on defendant's cars. Subsequent to this ruling the court permitted plaintiff, over the objection of the defendant, to testify as to damages sustained by reason of the shrinkage of the sheep while at Culbertson,

and prior to November 26th, the date of loading; the plaintiff testifying that he had suffered damage in the sum of \$356.12 by reason of such shrinkage. On cross-examination counsel for defendant asked the witness substantially the same questions relative to his conversation with Donovan, and as to the care and feed of the sheep at Culbertson prior to the day of shipment.

These requested instructions are, in substance: (1) That defendant never agreed to have cars at Culbertson on November 16th. (2) That defendant was not charged with any duty to have cars at Culbertson on November 16th, and the jury cannot allow plaintiff damages by reason of the failure of defendant to furnish cars on that day. (3) The defendant was not to blame for shrinkage prior to November 26th, and is not responsible therefor. (4) That the evidence does not justify recovery of damage on account of any act of defendant prior to the time of loading. The court refused to give these instructions, but, in lieu thereof, instructed the jury as follows: "You will disregard the claim of the plaintiff of \$356.12 for damages alleged to have been sustained by the sheep while at Culbertson, as plaintiff cannot recover for that under the allegations of this complaint." This instruction withdrew from the consideration of the jury all damage sustained prior to the loading of the sheep on the defendant's cars, and was, in our judgment, amply sufficient to protect the defendant, and to inform the jury that the plaintiff was not entitled to anything on account of expense or shrinkage while the sheep were at Culbertson.

Defendant claims that it was acting on the theory that the action was on contract, and was misled thereby, and permitted the evidence to go in without objection. Conceding this to be a fact, plaintiff cannot be prejudiced by reason of defendant's error in taking the wrong theory of the case. The plaintiff had a right to show the condition of these sheep at the time they were shipped. Introducing evidence as to the treatment and food received immediately prior to the shipment was one way of showing it. Whether the correct way or not, it was done

without objection, and we fail to understand how defendant was prejudiced thereby under this instruction.

4. The action of the court in giving its instructions Nos. 12, 13, and 15, and in refusing to give defendant's requested instructions Nos. 10, 11, and 13, is next assigned as error. The instructions given were framed upon the theory that, notwithstanding the valuation of \$2.50 per head, placed upon the sheep at the point of shipment by paragraph 7 of the special contract, plaintiff was entitled to recover the full amount of damage sustained by reason of injury, not exceeding that amount per head.

At common law the carrier is liable for the full amount of the damage resulting from his negligence. This liability may be limited by an express agreement made between the shipper and the carrier at the time of the delivery of the goods for transportation, provided the limitation be such as the law can recognize as reasonable, and not inconsistent with sound public policy. (*Hart v. Pa. R. R. Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717; *Express Co. v. Caldwell*, 21 Wall. 264, 22 L. Ed. 556; *Squire et al. v. N. Y. Cen. R. R. Co.*, 98 Mass. 244, 93 Am. Dec. 162.) And where the parties have, by stipulation, fixed upon a value of the property, such stipulation has the effect of limiting the liability of the carrier, and is, to that extent, a defense to an action for damages.

The value of the stock at the place of shipment and its value at the place of destination may be, and usually are, different. The costs of transportation paid by the shipper would seem to indicate that in such amount, at least, the stock had a greater value at the place of destination; else there would be little motive in making the shipment at all. The uncertainty of market conditions renders it difficult, if not impossible, to fix with precision the value the stock will have when the place of destination is reached. The value then agreed upon, unless the stipulation provides otherwise, has reference to the time and place of shipment. This value so fixed, whether for the purpose of obtaining shipping rights and concessions or as the true value

of the property, has, in the absence of limitations thereto, the effect of fixing the limit to the carrier's liability, whether from loss or injury. No question is made as to the liability of the carrier for the full value of the property so fixed in case of total loss, but it is claimed that in case of injury the carrier is liable for only a proportion of the amount, taking the stipulated value as the basis of calculation. To say that the phrases "loss of property" and "injury to property" have the same signification, is to declare them synonymous, when in fact they are not. The one means a total destruction or loss of property, the other means a partial loss or destruction; and in the case of injury a value may yet remain in the property equal to or exceeding the stipulated value. The freight paid by the shipper may equal the fixed value at the point of shipment, while the increase or decrease in the market value of the stock pending the shipment may materially affect the value at the time the same passes into the hands of the consignee. The two cases are so dissimilar that the rules for the assessment of damages can hardly be the same and preserve equity between the parties.

As to whether a contract may provide that the carrier shall be liable only for the fixed value in case of total loss without a refund of the freight paid, is not here discussed or decided. The general rule on this subject is thus stated in the fifth volume (2d Ed.) of the American and English Encyclopedia of Law, at page 335: "Where the stipulation limits the liability of the carrier in any event to a named sum in case of loss of the property shipped, and no loss occurs, but the property is injured, the shipper is entitled to recover damages for the injury up to the amount named, although the injured property may still be valuable. The effect of the stipulation is not to fix a limit in case of loss and a proportionate limit in case of injury, but to fix an amount which shall be the limit of recovery, whether for loss or injury."

In *Starnes v. Railroad*, 91 Tenn. 516, 19 S. W. 675, the contract under which the shipment was made contained the following stipulation: "And it is further agreed that, should damage

occur for which the said party of the first part may be liable, the value at the place and date of shipment shall govern the settlement, in which the amount claimed shall not exceed for a stallion or jack \$200, for a horse or mule \$100, which amounts it is agreed are as much as such stock as are herein agreed to be transported are reasonably worth." The court held: "The stipulation limited the liability of the defendant to \$100 (horse or mule) for each animal injured or killed, and that they should assess the damage according to the real injury caused by the carrier's negligence, in no any instance exceeding \$100 per head." It adds: "The question is not 'what did each animal bring in the market in its injured condition?' but rather, 'to what extent and in what amount not above \$100 was it damaged through the fault of the defendant; not what value is left in the animal, but what elements of value were wrongfully taken away?' * * * The agreement is that the carrier shall not be liable for more than the hundred dollars in case of damage; not that no liability shall attach if the horse, though injured, should sell for as much as that sum. The true measure of liability under the contract is the amount of actual damage resulting from the negligence of the carrier, in no case to exceed the sum stipulated. This is the most natural and reasonable construction of the contract; it is fair and just to both parties. A shipper will not be heard to claim or recover for damage or loss, however great, in excess of amount named in the bill of lading as the agreed value; nor will the carrier be allowed to deny liability for actual damages up to that amount. The carrier must respond for negligence up to that amount, but no further."

In *Hart v. Pa. R. R. Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717, the contract of shipment contained a clause to the effect that the carrier assumed a liability on the stock to the extent of \$200 per head for each horse or mule shipped. One of the horses shipped was killed, another was injured. The trial court charged the jury that: "It is competent for a shipper, by entering into a written contract, to stipulate the value of his property, and to limit the amount of his recovery in case

it is lost. This is the plain agreement that the recovery shall not exceed the sum of \$200 each for horses." This charge was sustained, the supreme court saying: "The limitation as to value has no tendency to exempt from liability for negligence. * * * The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value for the purposes of the contract of transportation between the parties to that contract. The carrier must respond for negligence up to that amount."

In *St. L. I. M. & S. Ry. Co. v. Lesser*, 46 Ark. 236, it was held proper to insert in the contract of shipment the provision that in case of injury or partial loss the amount of damages claimed should not exceed the same proportion. The contract before us contains no such provision, and does not contain any provision from which it can be reasonably inferred that such was the intention of the parties.

We believe the true rule of damages in such cases to be that laid down in the decisions quoted and as contained in the instructions of the court now under consideration, and this we believe to be the doctrine of the federal courts as well as those of almost all of the states. (*Hart v. Pa. Ry. Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717, and cases there cited.)

(a) Appellant further claims that the court's instructions No. 13, found on page 130 of the record, and No. 15, on page 134 thereof, are inconsistent with each other. These instructions are merely explanatory of each other, and are not in conflict. Both are based upon the theory that for injury caused by the negligence of defendant plaintiff could recover for the full amount of injury sustained, not exceeding \$2.50 per head, notwithstanding some value might still be left in the injured property. Requested instruction No. 13 is the same as the court's instruction No. 16, except as modified in accordance with the rule of law above stated; and requested instruction No. 11 is the same as the court's instruction No. 14, except the

words "gross negligence" are replaced by the word "negligence" in the instruction given. Defendant's requested instruction No. 10 is the same as the instruction given by the court in No. 12, except that in the instruction given the words "in case of loss" occur at the end thereof after the words "agreed value;" and, as these modifications accord with the view of the law herein taken, these requested instructions were properly refused.

5. Instructions Nos. 14, 15, and 18 were requested by the defendant on the theory that the contract relieved the defendant from liability resulting from delay, even though caused by its ordinary negligence. The court refused to give these instructions, and the defendant brings the question to this court.

Before inquiring into the precise terms of the special contract of shipment, it may be well to first consider the proposition as to whether it is permissible, under the law, for a carrier to limit his liability to such an extent that he may relieve himself from damages resulting from his own negligence, in the matter of delay. The statute of this state permits a carrier to limit his common-law liability to the extent therein stated. Section 2876, Civil Code, provides: "The obligations of a common carrier cannot be limited by general notice on his part, but may be limited by special contract." This section standing alone would seem to confer upon the carrier the right by special contract to limit his liability, even when guilty of gross negligence. Section 2877 of the same Code, however, provides: "A common carrier cannot be exonerated by any agreement made in anticipation thereof from liability for the gross negligence, fraud, or willful wrong of himself or his servants." This section limits the general power given the carrier by the preceding section. These two sections, construed together, give to the carrier the right by special contract to provide against liability in all cases except when it arises from his gross negligence, fraud, or willful wrong. Section 2912 of the Civil Code further provides: "A common carrier is liable for delay only when it is caused by his want of ordinary care and diligence." If this latter sec-

tion is to be construed with the other two, it is a further limitation upon the power of the carrier to contract away his liability. If it is not so construed, it would be hard to define the object of the legislature in enacting it, for it is only declaratory of rules of law already universally recognized by the courts.

It is a fundamental principle and universal rule that where a statute is taken from another state it is taken subject to the interpretation placed upon it by the courts of that state, and in principle it is difficult to understand why the same doctrine should not apply when a portion of the common law is enacted as a part of the statute. In *Baker v. Baker*, 13 Cal. 87, it was held that "a statute in affirmance of the common law is to be construed as was the rule by that law." This rule of construction would, perhaps, be modified by the statutory provisions that all statutes are to be liberally construed, with a view to effect their objects and to promote justice. (Section 4, Political Code; Section 4652, Civil Code.)

The very nature and necessity of the common carrier's employment, the enormity of the carrying trade, materially affect the vital interests of the entire country, and as such give to the public an interest in the rules and laws which should govern such employment. The interests of the parties primarily affected—that is, the shipper and the carrier—in any particular instance must be held to be subordinate to the welfare of the state and the community at large. The establishment of rules which will conserve the interests of the state and community, as well as the parties, is a matter of public policy; and the parties directly interested cannot be permitted, by special agreement or otherwise, to contract away these rules of law established for the conservation of public polity.

The general rule of law bearing upon this subject is stated in 5th Am. & Eng. Ency. Law (2d Ed.), 258: "The general rule is that a carrier cannot limit his liability for delay except by a special contract with the shipper, and that in no event can it limit its liability for delay resulting from its own negligence." (*Atchison, T. & S. F. R. R. Co. v. Ditmars*, 3 Kan. App. 459,

43 Pac. 833; *Branch v. Wilmington, etc. R. R. Co.*, 88 N. C. 573; *Pierce v. Southern Pac. Co.*, 120 Cal. 156, 47 Pac. 876, 40 L. R. A. 350; *Leonard v. Chicago & Alton Ry. Co.*, 54 Mo. App. 293.) In the latter case the court says: "The defendant is not to be allowed the benefit of a stipulation protecting it from its own negligence." The policy seems to be, as was expressed in *Rosenfield v. Peoria, etc. Ry. Co.*, 103 Ind. 123, 2 N. E. 346, 53 Am. Rep. 500, "The law will not allow a common carrier to contract to be safely negligent." The common carrier may not by contract confine his liability to damages resulting from his gross negligence, or from his willful negligence with respect to matters of delay. (5 Am. & Eng. Ency. Law (2d Ed.), 459; *Shriver v. Sioux City R. R. Co.*, 24 Minn. 508, 31 Am. Rep. 353; *Oxley v. Ry. Co.*, 65 Mo. loc. cit. 632; *Root v. N. Y. & N. E. R. R. Co.*, 83 Hun. 111, 31 N. Y. Supp. 357; *Missouri Pac. Ry. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574; *Alabama, etc. R. R. Co. v. Thomas*, 83 Ala. 343, 3 South. 802; Hutchinson on Carriers, Secs. 260-263; *Moulton v. St. Paul Ry. Co.*, 31 Minn. 85, 16 N. W. 497, 47 Am. Rep. 781.)

In *Hart v. Pa. R. R. Co.*, 112 U. S. 338, 5 Sup. Ct. 151, 28 L. Ed. 717, the court says: "It is the law of this court that a common carrier may, by special contract, limit his common-law liability; but that he cannot stipulate for exemption from the consequences of his own negligence and that of his servants. (*New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 12 L. Ed. 465; *York Co. v. Central R. R. Co.*, 3 Wall. 107, 18 L. Ed. 170; *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627; *Express Co. v. Caldwell*, 21 Wall. 264, 22 L. Ed. 556; *R. R. Co. v. Pratt*, 22 Wall. 123, 22 L. Ed. 827; *Bank of Kentucky v. Adams Exp. Co.*, 93 U. S. 174, 23 L. Ed. 372; *Railroad Co. v. Stevens*, 95 U. S. 655, 24 L. Ed. 535.)"

In *Railroad Co. v. Lockwood*, 17 Wall. 357, the court laid down the following propositions: "(1) A common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law. (2) It is not just and reasonable in the eye of the law for a

common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants."

The power of the common carrier to limit his liability by reasonable special contract has long been recognized. The statutes of 17 & 18 Vict. c. 31, par. 7, provides, in substance, that the carrier may make such special contracts only as shall be judged to be just and reasonable by the court before which the question may arise. (*Peek v. North Staffordshire R. R. Co.*, 10 H. L. Cas. 473; *Gregory v. West Midland R. R. Co.*, 2 H. & C. 944.) But no contract is reasonable that is subversive of public policy. Section 2912 of the Civil Code is equivalent to saying that a common carrier shall be liable for damages resulting from delays caused by its want of ordinary care and diligence; that is, for ordinary negligence. This being a legislative declaration as to when the common carrier shall be liable for delay, it cannot be abridged by special contract. It is a legislative limitation upon the previous general power given to contract. This rule that the common carrier may not limit his liability for delay arising from his own negligence prevails in the federal, and, it is believed, in all the state, courts, except those of New York (which permit the carrier to limit his liability against his own negligence), and of Illinois and Wisconsin, which permit the carrier to limit his liability except against his gross negligence. The handling of the defendant's trains was a matter peculiarly within the power of the defendant. The shipper could exercise no control. He was bound to await the will and action of the carrier; and, if his stock was injured as a result of negligent delay on the part of the carrier, he is, in the absence of negligence or fault on his part, entitled to reasonable compensation for such damages as he may have suffered by reason of loss or injury to his stock.

The terms of the special contract in this case with reference to the subject now under consideration are somewhat ambiguous, but the view of the law here taken renders it unnecessary to enter into any further discussion with reference to this contract on this subject. The court committed no error in refusing to give the instructions requested.

6. The court, by its instruction No. 6, told the jury, in substance, that if the evidence did not show that the sheep in question died or were injured from some inherent want of vitality, or by reason of injuries inflicted upon each other, or by unavoidable accident, the defendant company would be liable, unless it established by a preponderance of the evidence that the death or injury was occasioned from some other cause than its negligence; that, in the absence of such proof, the law would presume negligence on the part of the carrier.

The defendant contends that, inasmuch as the agents of plaintiff accompanied this shipment, the burden was on the plaintiff to show the cause of the death and injury. This position of the defendant is untenable under the facts of this case. The fact that the shipper accompanies the stock can have no greater effect than to relieve the carrier as an insurer when the loss or injury is shown to fall within the exception named in the special contract; but in this case the complaint declares upon the carrier's common-law liability. Any exception contained in the special contract limiting this liability is a matter of defense, and the burden is upon the defendant to show that it falls within the exception. The presence of the shipper or his agents upon the train transporting the stock could not of itself have the effect of delaying the train, and could not affect the question of negligence on the part of the carrier in the matter of delay. It was the duty of the defendant to afford the shipper proper facilities for watering, feeding, tending, and caring for the stock, and to transport the stock with reasonable diligence, and with as little delay as practicable. (Edwards on Bailments (2d. Ed.), par. 581, and note.) We also cite in this connection *Atchison, T. & S. F. R. R. Co. v. Ditmars*, 3 Kan. App. 459, 43 Pac. 833; *Leonard v. Chicago & Alton Ry. Co.*, 54 Mo. App. 293; 22 Am. Law Rev. 214 *et seq*; *Witting v. St. L. & S. F. Ry. Co.*, 101 Mo. 634, 14 S. W. 743, 10 L. R. A. 602, 20 Am. St. Rep. 636.

If the presence of the shipper or his agents, or their acts or conduct, had the effect of preventing the defendant from in

any manner fulfilling or discharging its duties as a common carrier, the burden of proving those matters was on the defendant.

Under the facts in this case, and other instructions given, we find no error in this instruction.

7. Another instruction given is as follows: "The court further instructs you that if you find from the evidence that an obstruction of the defendant's road by a snow blockade or otherwise existed at any point at the time these sheep were loaded, which would interfere with the prompt and safe carrying and delivery of these sheep, and which was known to the defendant, and the sheep were accepted by the defendant for shipment without informing the plaintiff of the state of affairs, the defendant cannot offer the obstruction as an excuse for failure to deliver promptly, even though the obstruction was the act of God. Having undertaken to take the shipment with full knowledge of the facts, its liability as a common carrier attached. It was bound to take notice of the signs of approaching danger if any were known to it, and, if the danger was of such a character as reasonably to awaken apprehension at a time when the facilities and means of escape from danger were within their control, they were bound to use such means for the safety of the property intrusted to their care."

The appellant complains of this instruction for the reasons (1) there is no evidence to base it upon; (2) that it is an erroneous statement of the law.

The record contains evidence as to the prevalence of a storm at the time this shipment was made; that the probability of obstruction was discussed, defendant's witnesses testifying that they informed plaintiff at the time of shipment that the worst blizzard ever known was prevailing in North Dakota along the line of defendant's road. The receipt of this information was denied by plaintiff, and the question as to the existence and severity of the storm and the dangers attendant upon the shipment became and was one of the issues in the case.

As to the second objection made by defendant to this instruction, we can only say that we find no error, but believe the same to state correctly the law as applicable to this case. The general rule governing this matter is expressed in *Lamont v. Nashville R. R. Co.*, 9 Heisk. (Tenn.), 58, in which the court says: "The company were bound to take notice of the signs of approaching danger, and, if of such a character as reasonably to awaken apprehension at a time when the facilities and means of escape from the danger were within their control, they were bound to use such means for the safety of the property intrusted to their care." Further sustaining this general proposition of law, we cite the following authorities: *Fox v. Boston & M. R. R. Co.*, 148 Mass. 220, 19 N. E. 222, 1 L. R. A. 702; *Corbett v. Chicago, St. Paul, M. & O. R. R. Co.*, 86 Wis. 82, 56 N. W. 327; *Hewett v. Chicago Ry. Co.*, 63 Iowa, 611, 19 N. W. 790; 5 Am. & Eng. Ency. Law (2d Ed.), 255; *Express Co. v. Jackson*, 92 Tenn. 326, 21 S. W. 666.

8. We have examined the other instructions given as well as refused, and find no error in the action of the court with respect thereto, excepting the last part of instruction No. 15, found on page 134 of the record, which will be further considered.

The objection made as to the conversation of plaintiff with Superintendent Hale is not well taken, as this evidence had a direct bearing upon the question of negligence. Nor can the objection be sustained that defendant had not received the notice specified in paragraph 6 of the special contract. The record, however, shows that such information was given to the defendant by letter, and that the railroad department called for information regarding it shortly after the shipment was made. This was a sufficient notice, unless objection was made thereto by defendant; and it does not appear from the record in the case that any such objection was made. A general discussion of this subject is found in the authorities cited. (*Central R. R. Co. v. Pickett*, 87 Ga. 734, 13 S. E. 750; *Wabash Ry. Co. v. Brown*, 152 Ill. 484, 39 N. E. 273; *Hess v. M. Pac. Ry.*,

40 Mo. App. 202; *B. & O. Express Co. v. Cooper*, 66 Miss. 558, 6 South. 327, 14 Am. St. Rep. 586; *Kansas & Ark. V. R. R. Co. v. Ayers*, 63 Ark. 331, 38 S. W. 515; *Owen v. Louisville & N. R. R. Co.*, 87 Ky. 626, 9 S. W. 698.)

The counterclaim of defendant was submitted to the jury, and they were told by the court in its instruction No. 17: "If your verdict upon the plaintiff's case is in favor of the plaintiff, you should deduct this amount, if plaintiff's established claim is large enough; otherwise you should find a verdict for the defendant for the balance or for its whole counterclaim." No special finding was asked or made with respect to the counterclaim of defendant, and it is impossible to ascertain from an examination of the record whether the jury wholly disregarded defendant's claim, or whether it allowed it in full, and deducted it from the amount of the verdict returned for the plaintiff.

The further contention made by the defendant that the evidence is insufficient to sustain the verdict cannot be sustained, for the reason that the testimony is conflicting on all points at issue, and this court has repeatedly held that in such a case it will not disturb the verdict or findings. The credibility and weight to be given to the testimony of witnesses is a question exclusively within the province of the jury, and the appellate court, in case of substantial conflict, has no power to disturb the findings thereon. This court cannot try the case *de novo*, and thus invade the province of the trial court by passing upon disputed questions of fact and the credibility of witnesses. (*Baxter v. Hamilton*, 20 Mont. 334, 51 Pac. 265; *Barnett v. Brown*, 18 Mont. 369, 45 Pac. 554; *Merchants' Nat'l Bank v. Greenhood*, 16 Mont. 431, 41 Pac. 250, 851; *Chicago Title & Trust Co. v. O'Marr*, 25 Mont. 242, 64 Pac. 506; *Wastl v. Mont. Union Ry. Co.*, 24 Mont. 159, 61 Pac. 9; *State v. Howell*, 26 Mont. 4, 66 Pac. 291; *State v. Ford*, 26 Mont. 2, 66 Pac. 293; *State v. Hurst*, 23 Mont. 484, 59 Pac. 911; *State v. Allen*, 23 Mont. 118, 57 Pac. 725.)

9. Plaintiff, in his testimony, stated that after leaving Culbertson the shrinkage of the sheep was 33 pounds per head, or

25 pounds in excess of reasonable shrinkage, causing a damage of three cents a pound through the loss of weight; and that, if the sheep had arrived at South St. Paul in good condition, it might have been necessary to feed them once before selling, but in the condition in which they were it was necessary to feed them four days before selling. The witness was then asked what the cost was of so feeding the sheep. This was objected to by the defendant as immaterial, and as not suggesting the proper measure of damages. This objection was overruled, and defendant excepted. The plaintiff, in answer to the question, stated that he expended for feeding the sheep in South St. Paul \$240; that the cost of one feeding of the sheep would have been \$40. The court, in instruction No. 15, found on page 134 of the record, used this language: "Plaintiff is entitled to recover such expenses in the way of feed as he was put to by reason of the condition of the animals in question on the arrival at their place of destination." Plaintiff further testified that "the sheep were weighed before and after they were fed this \$200 worth of hay," but nowhere in the record does it appear which of these weights was taken as the basis of calculation in ascertaining the shrinkage. The burden of proving damage in this regard was on the plaintiff. From his testimony the inference may be drawn that the sheep were weighed after they had been fed once, and that the cost of the first feeding, which he deemed to be necessary, was \$40, and that he was damaged in the sum of \$200 by reason of the extra feeding. This evidence on the part of plaintiff was uncontradicted, and the court in that part of the instruction given practically told the jury to allow this item of damages. If the weight of the sheep taken before the feeding of this \$200 worth of hay was used as the basis of comparison in calculating the shrinkage, it is easy to see that allowing the \$200 damage would be a double assessment of damages against the defendant; and as the burden of proving this damage, if any, was on the plaintiff, and his evidence failing to establish it, it was error in the court to so instruct the jury. It must be presumed that the jury allowed this damage, and that it is a part of the verdict rendered. The excess of damages

allowed, however, is capable of definite ascertainment, and the judgment rendered may, therefore, be corrected without another trial.

Upon a thorough examination of the entire case and the law bearing thereon, we are unable to find any material error other than that just mentioned. We therefore recommend that the case be remanded to the district court, with directions to grant a new trial, unless within thirty days after the filing of the *remittitur* from this court the plaintiff file with the clerk his consent in writing that the judgment be modified by deducting from the amount thereof the sum of \$200, in accordance with the views herein expressed, in which event, and upon the entry of the judgment as modified, the judgment and order appealed from be affirmed. We further recommend that, if such consent in writing be filed, and the judgment be modified, then appellant shall recover one-third of the costs of this appeal; otherwise, the appellant shall recover all the costs of the appeal.

PER CURIAM.—For the reasons given in the foregoing opinion it is ordered that this cause be remanded to the district court, with directions to grant a new trial, unless within thirty days after the filing of the *remittitur* from this court the plaintiff file with the clerk his consent in writing that the judgment be modified by deducting from the amount thereof the sum of \$200, and upon the entry of the judgment as modified the judgment and order appealed from be affirmed; that, if such consent in writing be filed, and the judgment be modified, then appellant shall recover one-third of the costs of this appeal, otherwise the appellant shall recover all the costs of the appeal.

CASES DETERMINED

IN THE

SUPREME COURT

AT THE

JUNE TERM, 1903.

THE HON. THEO. BRANTLY, Chief Justice.

THE HON. GEORGE R. MILBURN, } Associate Justices.

THE HON. WILLIAM L. HOLLOWAY, }

COMMISSIONERS:

HON. JOHN B. CLAYBERG,
HON. LEW L. CALLAWAY,
HON. W. H. POORMAN.

GEMMELL, APPELLANT, v. SWAIN ET AL., RESPONDENTS.

(No. 1,585.)

(Submitted May 25, 1903. Decided June 3, 1903.)

Mines — Location—Necessity of Discovery—Trespass — Injunction.

1. Rev. St. U. S. Section 2320 (U. S. Comp. St. 1901, p. 1424), relating to the location of mining claims on public lands of the United States, provides that no location shall be made until the discovery of the vein or lode within the limits of the claim located. *Held*, that one who had entered on a vacant 20-acre tract, and had begun prospecting shafts, but had made

no discovery, could not enjoin a trespass on the tract; he not alleging that the trespass was upon the ground surrounding his shafts, and of which he was in the actual occupancy.

- 2 The fact that he had posted notices of location would not enlarge his rights.
- 3 The fact that the trespassers had enjoined him from continuing work, and he had secured a reversal of the decree, was immaterial.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

SUIT by George Gemmell against John Swain and others. From a judgment for defenants, plaintiff appeals. Affirmed.

STATEMENT OF THE CASE.

This action was commenced in the district court by the appellant, who was plaintiff below, to secure an injunction restraining the defendants from entering upon, sinking shafts, running tunnels, discovering or attempting to discover veins of mineral in certain designated lands. The complaint alleges that on December 19, 1899, a portion of section 17, township 3 N., range 7 W., to the extent of 20 acres, was vacant, uninclosed, and unimproved mineral lands of the United States; that on that date the plaintiff, having reason to believe and believing that veins or lodes of rock in place, bearing gold, silver, copper, and other precious metals, existed therein, entered upon the above described land for the purpose of prospecting for and making discovery of such veins, and of locating the ground; that he proceeded to sink three shafts, but, before he made discovery of any such veins or lodes, he was enjoined by the district court in an action entitled "*Harley et al. v. M. O. P. Co. et al.*" from further prosecuting his search; that he then posted at each of said shafts a written notice that he claimed the ground about each shaft to the extent of 750 feet east, 750 feet west, 300 feet north, and 300 feet south from the point where the notice was posted; that the plaintiffs in that action then immediately went upon the land, and commenced work for the purpose of making discovery of veins containing such precious metals, and of locating the ground. The plaintiff sought an in-

junction restraining the defendants from further proceeding with such work. An order to show cause and a temporary restraining order were issued, but, before a hearing was had upon the order to show cause, the defendants Harley, Butte & Boston Company, and Boston & Montana Company filed a demurrer to the complaint, which was by the court sustained; and, the plaintiff refusing to amend, the restraining order was dissolved, an injunction refused, and a judgment for costs entered against the plaintiff, from which this appeal is taken.

Mr. George M. Bourquin, and *Mr. M. S. Gunn*, for Appellant.

The first question is: What, if any, right has a qualified locator in the actual possession of public mineral land while seeking in good faith to discover a lode therein and make a location thereof; and, second, if he has any rights, will they be protected in equity? The law is well settled in regard to the rights of one in the possession of public mineral land. (1 Lindley on Mines, Sec. 219.) The fact that the title is in the United States makes no difference. (Rev. Statutes U. S. Sec. 910.) The actual possession of lands will defeat the right to preempt the same lands by another person. (*Atherton v. Fowler*, 96 U. S. 513; *Hosmer v. Wallace*, 97 U. S. 575; *Trenouth v. San Francisco*, 100 U. S. 251; *Davis v. Scott*, 56 Cal. 165; *Smer v. Duggan*, 56 Cal. 257; *McBrown v. Morris*, 59 Cal. 64; *Erhardt v. Boaro*, 113 U. S. 527.) The courts have applied these same principles to the public mineral lands of the United States. (*Noyes v. Black*, 4 Mont. 527-535; *Garthe v. Hart*, 15 Pac. 93; *Crossman v. Pendery*, 8 Fed. 693; *Field v. Grey*, 25 Pac. 793; *Brandt v. Wheaton*, 52 Cal. 430-434; *North Noonday Co. v. Orient Co.*, 11 Fed. 125; *English v. Johnson*, 17 Cal. 107; *Table Co. v. Stranahan*, 20 Cal. 209; *Hess v. Winder*, 30 Cal. 355; *Rogers v. Coopey*, 7 Nev. 219; *Campbell v. Rankin*, 99 U. S. 262; *Phoenix M. & M. Co. v. Lawrence*, 55 Cal. 143; *Lebanon M. Co. v. Con. Rep. Co.*, 6 Colo. 380; *Weese v. Barker*, 7 Colo. 178.)

Appellant being in the actual occupancy of unoccupied public mineral land, under the above authorities, could protect such possession as against the defendants who were mere intruders. If appellant had a possession which the law would protect him in as against defendants, it seems to us equally clear that under the circumstances of this case equity will protect him in such rights for the following reasons:

1. The rights of appellant under his possession were to proceed to a proper discovery and location of quartz claims.

2. Defendants are endeavoring to destroy these rights by fraudulent acts: (a) By enjoining appellant from proceeding to make a discovery and location; and (b) Pending that injunction, going upon the ground and seeking to make a discovery and location thereof themselves.

Under the authorities above cited the rule is well settled that appellant might have maintained trespass against the defendants, based upon his actual possession. The rule is equally well settled that a trespass will be enjoined when irreparable injury is disclosed. In such case any interference which injures or destroys the substance of the estate is irreparable. Here the injury goes to the loss of the entire estate. Under appellant's possession he had a right to proceed to a discovery and location of the premises as quartz claims, and to obtain the title thereto. If defendants are allowed to go upon the land, while appellant is thus enjoined, and make a discovery and location of the ground, they will deprive appellant of all his right growing out of his possession, and therefore of the ground itself. Equity will protect a right even though no damages are alleged or proven. (*Moore v. Water Works*, 8 Pac. 816; *Mott v. Ewing*, 27 Pac. 194; *Kellogg v. King*, 46 Pac. 166; *Bettman v. Harness*, 36 L. R. A. 566.)

Again, the theory of an injunction in a trespass case is that the court will hold the premises in *statu quo* until the final determination of the controversy. (*Johnson v. Hall*, 9 S. E. 783; *Haight v. Lima*, 36 Wis. 355; *Beach on Injunctions*, Secs. 109 and 112; *N. P. R. R. v. City of Spokane*, 52 Fed. 428-430.)

Messrs. Forbis & Evans, and Mr. T. Bailey Lee, for Respondents.

MR. JUSTICE HOLLOWAY, after stating the case, delivered the opinion of the court.

The only question for determination is whether the complaint states facts sufficient to entitle the plaintiff to an injunction. The complaint, upon its face, shows that the land in dispute was vacant, uninclosed, and unimproved mineral land of the United States; that the plaintiff went upon it, and was prospecting for veins of mineral-bearing rock, when he was enjoined. He had made no discovery, and consequently no location had been made, and none could be, for a location can rest *only* upon an actual discovery of such vein or lode. (*Hauswirth v. Butcher*, 4 Mont. 299, 1 Pac. 714; Section 2320, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1424].) He was simply a prospector upon the public domain, with the bare, naked possession of the ground immediately about the three shafts where he was prosecuting his work. His possession was only such as is characterized in the law as *possessio pedis*, and could not be enlarged to include the entire 20-acre tract, or the whole amount of ground which he might have claimed under one or more quartz locations. Until discovery is made, no right of possession to any definite portion of the public mineral lands can even be initiated. Until that is done, the prospector's rights are confined to the ground in his actual possession, and until that possession is disturbed no right of action accrues, and even then no injunction would issue to restrain a mere trespass—certainly not in the absence of some showing of irreparable injury or the insolvency of the trespasser.

No contention is made that the work done by the defendants in prospecting this ground was done in or about any one of the shafts where plaintiff was prosecuting his work when enjoined, or that the work done by the defendants in any manner interfered with the work done by the plaintiff. The fact that plain-

tiff posted a notice at each of his shafts did not create any new right in him, or enlarge the right he already had. A notice of location (for such these notices purported to be) posted upon mineral land before discovery is made is an absolute nullity. (*Upton v. Larkin*, 5 Mont. 600, 6 Pac. 66; Section 2320, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1424].) The mere fact that the plaintiff was enjoined from continuing his work, and that, too, wrongfully, as determined by this court (*Harley v. M. O. P. Co.*, 27 Mont. 388, 71 Pac. 407), did not alter the relative rights of the parties, or entitle the appellant here to an injunction in this action. Competing prospectors cannot make use of the writ of injunction to secure priority of discovery or location on, or apparent superiority of right to, a mining claim.

We are of the opinion that the complaint does not state facts sufficient to entitle the appellant to an injunction, and that the district court committed no error in sustaining the demurrer. The judgment is affirmed.

Affirmed.

STATE EX REL. POWER ET AL., RELATORS, v. NAPTON,
RESPONDENT.

(No. 1,948.)

(Submitted May 23, 1903. Decided June 6, 1903.)

Referees—Bill of Exceptions—Duty of Counsel to Incorporate Evidence—"Exceptions."

- 1 Under Code of Civil Procedure, Section 1152, it is the duty of counsel to incorporate in their bill of exceptions so much of the evidence in substance, as is necessary to explain the objection and exception reserved thereon, and a referee is justified in refusing to settle a bill which recites, "The following testimony was taken before the referee: (Clerk will here insert testimony)."
2. Under the provisions of the Code of Civil Procedure, the term "exception" has an extended signification, there being exceptions on the ground of insufficiency of the evidence, as well as exceptions on the ground of error in law.

- 3 *Semble*: After a referee has filed his report, he may file corrections of manifest clerical errors in his report, without another reference of the case for the purpose of permitting him to make them.

APPLICATION for *mandamus* by the state, on the relation of W. I. Power and Thomas Trevaile, against H. P. Napton, referee. Dismissed.

Mr. George A. Maywood, and Mr. D. M. Durfee, for Relators.

Mr. W. L. Brown, and Messrs. Word & Word, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Application for writ of *mandamus*. On March 11, 1902, in a cause entitled "*Power et al. v. Patten*," pending in the district court of the Third judicial district in and for Granite county, brought for the purpose of dissolving a partnership between the plaintiffs and the defendant and for a settlement of the partnership accounts, H. P. Napton, Esq., was by the court appointed referee to hear and decide all the issues involved, and to report findings and a judgment thereon. The referee heard the evidence, and made his findings and conclusions of law, showing a balance due defendant, and on February 18, 1903, his report embodying them was filed with the clerk. On the following day the clerk notified counsel for both parties of the decision of the referee. On March 12th the referee filed with the clerk a paper entitled "Correction of Report of Referee," calling the attention of the court to certain "clerical" errors appearing in the findings of fact, and recommending that they be corrected by the court. On March 13th the court overruled plaintiff's objection to the report, and directed a decree to be entered in accordance with the report, after making the correction suggested by the referee. On March 20th counsel for plaintiffs served and filed their notice of intention to move

for a new trial embodying all the statutory grounds. On March 28th they served upon counsel for defendant a draft of their proposed bill of exceptions. Amendments were proposed, but with a reservation that objection would be made to settlement on the ground that the notice of intention had not been served in time. The bill with the amendments was then, upon due notice, presented to the referee for settlement. Counsel for the defendant objected to the settlement on the ground that the notice had not been served in time, and also upon the further ground, among others, that the bill as presented was not prepared in "manner, form, and substance" as required by Section 1152 of the Code of Civil Procedure, in that it questions the sufficiency of the evidence to sustain the findings of the referee, while it contains no statement of the case, but simply refers to the evidence heard by the referee. The portion of the bill referred to contains the following: "After the filing of said order (of reference), to-wit, between the 29th day of April and the 3d day of May, 1902, the following testimony was taken before the referee: (Clerk will here insert testimony.)" The referee, after a hearing, but without giving any reason, refused to settle the bill, and at once notified counsel of his action. Thereupon counsel for plaintiffs applied to this court for a writ of *mandamus* to compel the referee to make the settlement.

Upon the return of the alternative writ two questions were argued and submitted, namely: (1) Whether the notice of intention was served and filed within ten days after notice of the decision of the referee, and, incidentally, whether the ten days for giving the notice under the statute (Code of Civil Procedure, Sec. 1173) began to run from the date of notice of filing of the report on February 18th, or whether it began to run from the date of the corrected report on March 12th; and (2) whether, conceding that the notice was given in time, the bill was proposed in such form that it was the duty of the referee to settle it.

Under the view we have taken of this case, it will not be necessary to decide the first question submitted. The errors cor-

rected consisted of a substitution in the findings of fact of the name of one of the plaintiffs for that of the defendant where it was obvious that the referee had intended to use the name of such plaintiff, and in the footings of the items of account by which the amount of the judgment recommended was less by \$150 than it should have been, this being entirely clear from an inspection of the items. We doubt whether the corrections were not properly made without another reference of the case for the purpose of permitting the referee to make them. But, be this as it may, the bill as presented to the referee was not in such form that he was required to settle it. Under Section 1152 of the Code of Civil Procedure it was the duty of counsel to incorporate in their bill so much of the evidence, in substance, as was necessary to explain the objection and exception reserved thereon. Under this section reference may be made to the documents on file in the action when such reference will sufficiently present the objection and exception relied on; and, so far as these are concerned, the bill may be presented for settlement in skeleton form. But this provision does not apply to the evidence, for the obvious reason that the evidence introduced upon the hearing must be reproduced from the stenographer's notes, and settled by the judge or referee, in order that the record may conform to the truth. To produce the evidence is the duty of the party desiring to preserve it in the record to be used on his motion or upon appeal. The determination of what evidence was introduced on the trial, and the reduction of it to proper form, may not be left to the clerk, for the clerk may not be allowed to determine what evidence was used, or whether the form in which it is sought to be incorporated in the bill meets the requirements of the statute. Hence the bill as presented by the plaintiffs was not such in form or substance as to meet the requirements of the statute. This has been declared to be the rule by the Supreme Court of California under a statute containing identical provisions, and we think the cases decided by that court are clearly correct. (*People v. Getty*, 49 Cal. 581; *Frazer v. Superior Court*, 62 Cal. 49; *Valleau v. Superior*

Court, 62 Cal. 290.) Section 1173 of the Code of Civil Procedure, in relation to a bill of exceptions or statement on motion for new trial, contains no such provision as that referred to in Section 1152, *supra*, with reference to the contents of the bill or statement. Yet that provision unquestionably applies to such a bill or statement, for the reason that the term "exception" "has an extended signification, there being exceptions on the ground of insufficiency of the evidence as well as exceptions on the ground of error in law." (Hayne on New Trial and Appeal, Sec. 156.)

The bill presented by the plaintiffs was not a proper one, and the referee was justified in disregarding it. The alternative writ is therefore set aside, and the application dismissed.

Dismissed.

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34 191

COOK ET AL., RESPONDENTS, v. GALLATIN RAILROAD
COMPANY ET AL., APPELLANTS; WALTZ
ET AL., INTERVENERS.

(No. 1,556.)

(Submitted April 30, 1903. Decided June 6, 1903.)

Mechanics' Liens—Foreclosure — Amended Complaint—Refusal to Permit Demurrer—Engineer's Estimate—Impeachment—Admissibility of Evidence—Instructions in Chancery Case—Review of Error — Intervention—Notice of Lien—Owner's Name—Claim for Money—Rules of Supreme Court—Briefs—Assignments of Error.

1. The refusal to permit defendants to demur to a complaint amended after the jury is sworn is not ground for reversal, where no ground for the demurrer was stated, nor any written demurrer offered, and the complaint seems to have stated a cause of action.
2. Though, in a mechanic's lien foreclosure, plaintiffs declare on a contract under which a settlement was to be had on a final estimate of defendants' superintendent of construction, and defendants deny that plaintiffs have

complied with the contract, yet, where both parties on the trial seek to impeach the superintendent's estimate, the defendants cannot complain that the admission of plaintiffs' evidence of its inaccuracy was error.

3. Where defendants in a mechanic's lien foreclosure themselves seek to impeach their superintendent's estimate of the work, the admission of hearsay evidence of his statements that his estimate was erroneous is harmless error.
4. In a mechanic's lien foreclosure, a witness' testimony that a certain person made calculations as to the amount of work done, and dictated them to him, is insufficient to warrant the introduction of such estimates.
5. Since a suit to foreclose a mechanic's lien is a proceeding in chancery, the jury's findings are only advisory, and error in instructing them is not reviewable.
6. Under Code of Civil Procedure, Section 2131, requiring notice of a mechanic's lien to be filed in the county clerk's office, and Section 2132, requiring that the clerk's abstract shall contain the name of the person against whose property the lien is filed, the filing of notice of a lien upon the property of the Yellowstone Park Railway Company and the Yellowstone Park Railroad Company will not warrant intervention in a mechanic's lien foreclosure against the Gallatin Railroad Company, though the complaint in intervention alleges, on information and belief, that the corporations are substantially the same.
7. Merely a money demand against a defendant in a mechanic's lien foreclosure will not warrant intervention therein, though plaintiffs consent thereto.
8. Assignments of error in appellants' brief which fail to comply with the rules of the supreme court, will not be considered.
9. Where the overruling of a motion is assigned as error, and the language of the motion as it appears in the transcript is not the language of the assignment and does not convey the same idea, the assignment will not be considered.
10. Where the record fails to show that the court ruled upon an offer of testimony, an assignment based upon the exclusion of such testimony will not be considered.

Appeal from District Court, Gallatin County; F. K. Armstrong, Judge.

ACTION by Andrew B. Cook and Martin Woldson, partners doing business under the firm name of Cook & Woldson, against the Gallatin Railroad Company and another, in which J. B. Waltz and P. L. Reece, partners under the firm name of Waltz & Reece, intervene. From a decree for plaintiffs and interveners, and from an order overruling a motion for a new trial, defendants appeal. Modified.

Mr. John A. Luce, for Appellants.

The lien, exhibit "A," was based upon the contract and not upon a *quantum meruit*. The plaintiffs could not recover both

upon the expressed contract and the implied contract. The complaint was certainly demurrable for uncertainty, it was demurrable for want of facts and for uncertainty in the description of the property sought to be foreclosed and in other particulars, the defendant has a right to demur and can not be restricted to an answer merely where a complaint is amended. He pleads *de novo*. (*Frick v. Manhattan R. Co.*, 15 Daly (N. Y.), 479, 24 Abb. N. Cas. 81; *Harriott v. Wells*, 9 Bosw. (N. Y.), 631; *Speake v. Prewitt*, 6 Texas, 252; *Cleveland v. Cohrs*, 13 S. Car. 397; *Shaw v. Brown*, 42 Miss. 309; *State v. Green*, 4 Gill & J. (Md.), 381.)

It was error for the court to allow the plaintiffs to attempt to discredit the final estimate which they themselves had introduced in evidence over the objection of the defendants; the decision of the superintendent of construction was final and binding and conclusive upon both parties to the contract, unless some fraud or collusion was alleged against him. (*U. S. v. Robeson*, 9 Pet. 319; *Construction Co. v. Stout*, 8 Colo. 61; *Butler v. Tucker*, 24 Wend. 449; *Myer v. Pac. Construction Co.*, 27 Pac. 584; *Bickle v. Irvine*, 9 Mont. 251; 9 Enc. Pl. & Pr. pages 684-689; *Queen v. Hepburn*, 7 Cranch, 291; Rice on Evidence (Civil), Vol. I, Secs. 93-95, 211; *Vurick v. Jackson*, 2 Wend. 166, 201; *Thompson v. Blanchard*, 4 N. Y. 303, 311; *Williams v. Sargent*, 46 N. Y. 481-483; *Fordham v. Smith*, 46 N. Y. 683; Code of Civil Procedure, Secs. 3378-3380; *U. S. v. Jones*, 3 Wash. C. C., 209; *Lawrence v. Barker*, 5 Wend. 301-305; *Smith v. Briggs*, 3 Denio, 74; *Loup v. Cal. S. R. R. Co.*, 63 Cal. 97, 102; *Herrick v. Belknap*, 27 Vt. 673; *Smith v. Brady*, 17 N. Y. 173-177; *Pres. of D. & H. Canal Co. v. Penn Coal Co.*, 50 N. Y. 250-271; *Denver & N. O. Const. Co. v. Stout*, 5 Pac. 627-631; *Hudson v. McCartney*, 33 Wis. 331.)

It was necessary to allege and prove the performance of the contract before any mechanic's lien could be filed or recovery had. (*Smith v. Brady*, 17 N. Y. 173; *Loup v. Cal. S. R. R. Co.*, 63 Cal. 97-102; 13 Enc. Pl. & Pr. 978, and cases cited;

Jacques v. Morris, 2 E. D. Smith, 639; *Franklin v. Schultz*, (Mont.), 57 Pac. 1037; *Harmon v. Ashmead*, 60 Cal. 439; *Jackson v. Cleveland*, 19 Wis. 400.)

The plaintiffs could not abandon the contract and sue upon a *quantum meruit*. (*Carroll v. Craine*, 9 Ill. 563; *Malone v. Big Flat Gravel Company*, 18 Pac. 772; *Wilson v. Hind*, 45 Pac. 695; *Reed v. Norton*, 26 Pac. 767; 15 Enc. Pl. & Pr. 1002, 1003, and cases cited.)

The plaintiffs should have been required to elect upon which cause of action they would stand. (*Scofield v. Miltimore*, 74 Wis. 194, Opin. 198, 199; *Dewey v. Fifield*, 2 Wis. 73; *Deane et al. v. Wheeler*, 2 Wis. 224.)

The failure of plaintiffs to pay Waltz & Reece was proof of failure on the part of the plaintiffs to complete the contract and to furnish the labor, material, etc., thereunder. (*Cockrill v. Davie*, 14 Mont. 131-135.)

The plaintiff should not have been allowed to recover any more than the amount shown by Mr. Wiswell's estimate which was made conclusive by the contract. (Story, Equity Jurisprudence, Sec. 1457.)

There is a variance between the contract alleged by plaintiffs in the lien and in the body of the complaint and that which was proved on the trial. Furthermore the contract was not pleaded in the complaint or in the lien either according to its legal effect, or in *haec verba*. (Sec. 747-748, C. C. P.; *Quick v. Clark*, 7 Mont. 731; *Jones v. Shuey*, 40 Pac. 17; *Eaton v. Malabeta*, 92 Cal. 75.)

The lien filed does not contain a correct description of the property to be charged. It does not show in what township, section, range or subdivision any part of the line or right of way or road bed is situated, nor does it show the width or dimensions of the road bed or of the right of way or how said land was to be covered or taken. No property could be identified by the description. The description might cover any piece of land whatever that might run in a southeasterly direction from the station at Mountain Side. The lien was void for uncertainty.

(Sections 2131, 2132, 2133, C. C. P.; *Kellogg v. Littell & Smythe Mfg. Co.*, 25 Pac. 461-462; *Goodrich Lumber Co. v. Davie*, 13 Mont. 76; *Rawson v. Sheehan*, 78 Mo. 668; *Pillz v. Killingsworth*, 20 Oregon, 432; *Turney v. Saunders*, 5 Ill. 527; *Crawfordville v. Barr*, 65 Ind. 367; *Munger v. Green*, 20 Ind. 38; *Short v. Ames*, 121 Pa. St. 530; *McCarty v. Van Etten*, 4 Minn. 461; *Penrose v. Calkins*, 19 Pac. 641; *Willamette Steam Mill & Lumber Co. v. Kremer et al.*, 24 Pac. 1026; *Mt. Tacoma Mfg. Co. v. Cultum*, 32 Pac. 95.)

There was no evidence introduced to show the ownership of the right of way and the land which was sought to be condemned. It was necessary for them to prove the ownership of the lands in addition to the road bed. It was admitted that defendant owned the road bed, but there was no admission as to the right of way. The road bed is the bed or foundation for the superstructure of a railroad. To entitle plaintiffs to a judgment of foreclosure it was necessary for them to prove the ownership of the right of way as well as this superstructure. (*Nelson v. Clerf*, 30 Pac. 716; *San Francisco v. Central Pac. Railroad*, 63 Cal. 469; *San Francisco, etc. v. Board of Equalization*, 60 Cal. 1234; *Santa Clara Co. v. Southern Pac. R. R. Co.*, 118 U. S. 395; *Front St. Cable Ry. Co. v. Johnson*, 25 Pac. 1084; *Morehouse v. Collins*, 31 Pac. 295; *Kellogg v. Littell Mfg. Co.*, 25 Pac. 461, and cases cited 462; *Santa Cruz Rock Pavement Co. v. Lyons*, 48 Pac. 1097; *Williams v. Vanderbilt*, 145 Ill. 238, S. C. 21 L. R. A. 489; *Munster v. Doyle*, 50 Ill. App. 672.)

The lien filed was further fatally defective in not stating the time, terms and conditions of the contract under which the work was done and materials furnished. (*Hooper v. Flood*, 54 Cal. 218.)

The interveners must stand or fall upon the lien filed and this can not be aided by averments. (*Goss v. Strelitz*, 54 Cal. 640.)

Messrs. *Hartman & Hartman*, and Mr. *M. S. Gunn*, for Respondents.

There are some twenty-eight errors specified in the appellants' brief, but of all these errors only a few can be considered by this court, under its rules and decisions. The decisions of this court hold appellants strictly to the requirements of the rules, and that a failure to comply with Rule 10 warrants the court in refusing to consider the errors charged. (*State v. Shepphard*, 23 Mont. 323; *State v. Allen*, 23 Mont. 118; *McCleary v. Crowley*, 22 Mont. 245-247; *Babcock v. Caldwell*, 22 Mont. 460-462; *Gibson v. Hubbard*, 22 Mont. 517; *Anderson v. Carlson*, 23 Mont. 43; *Smith v. Denniff*, 23 Mont. 65-67; *State v. Shepphard*, 23 Mont. 323-327; *Missoula Mer. Co. v. O'Donnell*, 60 Pac. 594; *Cole v. Ryan*, 60 Pac. 991; *Schatzlein Paint Co. v. Godin*, 62 Pac. 819; *Rehberg v. Greiser*, 62 Pac. 820; *Patterson v. Pfouts*, 64 Pac. 222.)

The action was for the foreclosure of a lien mentioned in the complaint, and was, therefore, an equitable action and the verdict of the jury was simply advisory to the court. (*Mochon v. Sullivan*, 1 Mont. 470; *Simonton v. Kelly*, 1 Mont. 483; *Riale v. Roush*, 1 Mont. 474; *Davis v. Alvord*, 94 U. S. 545; *Sanford v. Gates, Townsend Co.*, 21 Mont. 277; *Basey v. Gallagher*, 20 Wall. 670; *Mantle v. Noyes*, 5 Mont. 274.)

It being an equitable action, and the verdict of the jury being simply advisory to the court, no error can be considered by this court which is predicated on the instructions of the court below to the jury, either in giving instructions or in refusing instructions presented. (*Lawlor v. Kemper*, 20 Mont. 13; *Haggin v. Saile*, 23 Mont. 375; *Sweetser v. Dobbins*, 65 Cal. 529; *Schneider v. Brown*, 85 Cal. 205; *Riley v. Martinelli*, 97 Cal. 575; *Richardson v. City of Eureka*, 110 Cal. 441.)

The record does not show that the instructions requested and refused were signed by counsel. (Section 1080, Subd. 7, C. C. P.; *Darnell v. Sallee*, 34 N. E. 1020; *Buchart v. Ell*, 36 N. E. 762; *Bank v. Bennett*, 36 N. E. 551; *Railway Co. v. Mitchell*, 26 S. W. 154; *Railway Co. v. Hobbs*, 43 N. E. 479; *Schoolfield v. Houle*, 13 Colo. 394.)

The testimony upon all contested points was conflicting and this court will not, therefore, consider the question as to the insufficiency of the testimony to sustain the decree of the court below. (*Ingalls v. Austin*, 8 Mont. 333; *Reardon v. Patterson*, 19 Mont. 231; *McIntyre v. McCabe*, 19 Mont. 333; *Harrington v. B. & B. M. Co.*, 19 Mont. 411; *Nyhart v. Pennington*, 20 Mont. 161; *Baxter v. Hamilton*, 20 Mont. 327; *Gallagher v. Cornelius*, 23 Mont. 27; *State v. Allen*, 23 Mont. 118; *O'Rourke v. Sherman*, 23 Mont. 310; *Noyes v. Ross*, 23 Mont. 425; *State v. Hurst*, 23 Mont. 484.)

Common counts are admissible under a system of Code pleading. (*Hosley v. Black*, 28 N. Y. 438; *Cattagnino v. Balletta*, 82 Cal. 250; *Farron v. Sherwood*, 17 N. Y. 227; *Pleasant v. Samuels*, 45 Pac. 998; *Galvin v. MacM. & M. Co.*, 14 Mont. 508; *Nyhart v. Pennington*, 50 Pac. 413.)

Where work and labor have been performed or done under a special contract, which has been fully executed by the plaintiff, and nothing remains to be done except the payment of money which is due, a recovery may be had on a *quantum meruit*. (*Farron v. Sherwood*, 17 N. Y. 227; *Stuckey v. Hardy*, 41 N. E. 606; *Shepard v. Mills*, 50 N. E. 709; *Moore v. Mfg. Co.*, 20 S. W. 975; *Castagnino v. Balletta*, 82 Cal. 250; *Electric Co. v. Berg*, 30 S. W. 454; *Higgins v. Railroad Co.*, 66 N. Y. 604; *Railroad Co. v. Donovan*, 65 N. W. 583; *Devecmon v. Shaw*, 9 Am. St. Rep. 422; *Ludlow v. Dole*, 62 N. Y. 617; *Gambril v. Schooley*, 43 Atl. 918; *Ingle v. Jones*, 2 Wall. 1; Note to *Cutter v. Powell*, 2 Smith's Lead. Cases, 41; *Lane v. Adams*, 19 Ill. 167; *Tunnison v. Field*, 21 Ill. 108; *Combs v. Steele*, 80 Ill. 101; *Fowler v. Deakman*, 84 Ill. 130; *Davis v. Badders*, 10 So. Rep. 422; *Board of Commissioners v. Gibson*, 63 N. E. 892.)

Appellants contend that the procuring of the certificate of the superintendent of construction of the road that the work was completed, was a condition precedent to the right of payment, and that plaintiffs should have alleged in their complaint the procurement of this certificate or made allegations showing a

legal reason why it had not been obtained. As to this point we say, that where the contract has been completed and the action is brought on the *quantum meruit* no such allegation need be contained in the complaint and the plaintiff can make proof of the facts necessary to establish his claim without any special allegation. (*Elevator Co. v. Clark*, 80 Fed. 705; *Higgins v. Railroad Co.*, 66 N. Y. 604; *Castagnino v. Balletta*, 82 Cal. 250; *Combs v. Steele*, 80 Ill. 101; *Fowler v. Deakman*, 84 Ill. 130; *Davis v. Badders*, 10 So. Rep. 422.)

The final estimate is conclusive that the contract was completed. (*Wyckoff v. Meyers*, 44 N. Y. 143; 29 Am. & Eng. Ency. Law, pp. 937 and 938.)

Even if the court committed error as to interveners' second cause of action, it should not be sufficient to reverse the entire judgment, but this court would have the right and it would be its duty to so modify the judgment against the appellants as to cure any error on account of the second cause of action of interveners. (*Ramsdell v. Clark*, 20 Mont. 103.)

This court cannot review the action of a lower court in refusing an application for a new trial in an equity case unless it appears that all or substantially all of the evidence introduced at the trial is contained in the record. (*Baker v. Ray*, 2 Russ. 75; *Watt v. Starke*, 101 U. S. 247; *Bootle v. Blundell*, 19 Ves. 500; *Still v. Saunders*, 8 Cal. 281; *Currie v. M. C. Ry. Co.*, 24 Mont. 123; *T. C. Power & Bro. v. Stocking*, 26 Mont. 478; *Merchants' Nat'l Bank v. Greenhood*, 16 Mont. 395, p. 450 *et seq.*; *M. O. P. Co. v. B. & B. C. M. Co.*, 25 Mont. 427.)

MR. JUSTICE MILBURN delivered the opinion of the court.

This is a suit for the foreclosure of a lien upon the property of the defendant railroad company, with intervention by the interveners named in the title of the cause.

It has been very difficult to get a correct idea of the pleadings and of the theory upon which the case was tried, as the plead-

ings were not as skillfully drawn as they might have been, and because the brief of the appellants fails to comply with the rules of the court in some particulars, thus requiring us to rely upon our own research in some parts, and causing us to fail to discover appellants' meaning in other places, and, further, because the argument is involved, going from one point to another without any attempt to take up and discuss the points in the order in which they are indicated in the assignment of alleged errors.

Plaintiffs filed in the office of the county clerk a notice of lien, and brought an action to foreclose the lien, declaring upon a contract in writing, in which, among other things, it was stipulated that the parties thereto should settle upon the final estimate of the superintendent of construction of the defendant railroad company. Plaintiffs averred that they had complied with the terms of the contract, and that under its terms they were entitled to a balance of \$13,252.82, with attorney's fees and costs. After a jury was sworn, plaintiffs, with leave, amended their complaint by adding a paragraph declaring the reasonable worth of all of the labor done to be the sum of \$30,022.82. There does not seem to have been any objection to this amendment, which was made after the second amended answer, upon which defendants relied on the trial, had been filed. The defendants asked leave to interpose a demurrer to the complaint as amended, but the record fails to disclose that they stated upon what grounds they wished to demur, or that they offered any demurrer in writing to the court. Upon the trial the plaintiffs, for the purpose of showing that the work had been completed, introduced in evidence the "final estimate" of one Wiswell, who was the superintendent of construction of the defendant company. Examination of the complaint, the answer, and of this estimate, which appears in full in the record, makes it certain that the plaintiffs claimed and introduced proof to show that they had excavated and removed cubic yards of solid rock and loose rock largely in excess of the number of cubic yards stated in the Wiswell estimate, and that the defendant company denied on the trial that the number of cubic yards of solid rock and

loose rock removed by plaintiffs was as great as claimed by plaintiffs or stated in the said estimate, and introduced proof to support their contention.

The interveners, having filed two notices of lien, asked that as to one cause of action they be allowed a lien, with provision for a deficiency judgment against plaintiffs; and, as to the second cause of action, without any reference to any claim against plaintiffs, they asked for a lien on the property of the defendants. The notice of lien first mentioned in the bill of intervention, referring to plaintiffs, declared the name of the owner of the property upon which they sought a lien to be the Yellowstone Park Railway. In the other notice set out in connection with their second cause of action, without any reference therein to plaintiffs, interveners describe the owner to be the Yellowstone Park Railroad Company. Defendants demurred to the complaint in intervention, and to each cause of action therein set forth; one ground being that it did not, as a whole, or as to either cause of action, state facts sufficient to constitute a cause of action. This demurrer was overruled. The plaintiffs admitted all that interveners claimed, except as to the amount alleged to be due, and as to this they admitted all except a small sum. The court brought in a jury to advise it. The jury found for plaintiffs, assessing the damages at \$14,077.37. The court found and entered its decree in favor of plaintiffs and interveners; adjudging liens upon all the property of the defendants as prayed, and directing that the property be sold to satisfy the liens. The defendants appeal from the decree, and from an order overruling a motion for a new trial.

Twenty-eight assignments of error are in the brief, one of them not being numbered.

1. Defendants declare that the court erred in refusing to allow them to interpose a demurrer to the plaintiffs' complaint as amended, and in compelling defendants to answer immediately the same. While this appears to be two points in one, the only point apparently argued and relied upon is that the court erred in refusing to allow a demurrer to be interposed to the

complaint as amended; it having been amended after the jury were sworn by adding a paragraph to the effect that the work and the labor done were reasonably worth the sum of \$30,022.82. The record does not show that the demurrants stated any ground to the court why the answer as amended was demurrable. If a demurrer in writing was offered, it has not been pointed out in the record. The complaint seems to state a cause of action, and we cannot hold that the court erred as assigned.

It does not appear that the defendants asked leave to amend their answer, or suggested that they wished to do so.

2. The 2d, 3d, 4th, and 5th assignments of alleged error refer to the court's action in permitting the introduction of testimony showing or tending to show that the "final estimate" made by the superintendent of construction, Wiswell, was inaccurate as to the classifications of the rock and earth removed. The fifth assignment we do not notice, except so far as it may be covered by the remarks made in this paragraph, for the reason that it does not make any reference to any page of the record, and contains several assignments merged in one. We do not find that the court erred in permitting the appellants to introduce evidence to show the quantities of rock, loose rock, earth, etc., which were actually removed under the contract, and that the statement of Wiswell was not true. The case was tried by each party on the assumption that the statement of Wiswell was not correct, and that it had not been considered by either party as the basis of settlement. The plaintiffs said it showed too little work done under some classifications, and the defendants declared that it showed too much done under the same heads. It having been repudiated by each party in open court upon the record, it does not seem to us that any prejudice could result in admitting the testimony which was introduced by each side. It is true that plaintiffs declared in their complaint upon a contract in writing, under the terms of which they could not be paid until a final estimate had been made; and it is also true that the plaintiffs did not in their complaint, avoid or attack the truth of the final estimate which was made. It also appears

that the defendants denied that the plaintiffs had complied with the terms of the contract. But the case having been tried and submitted in the court below upon the theory that the "final estimate" was not true, appellants cannot now maintain that, under the complaint, evidence was not admissible to show that the final statement was false. Such evidence as may have been hearsay as to Wiswell having said that his final estimate was false could not be prejudicial, as defendants themselves declared that the said estimate was not true.

3. As to assignments 6, 7, 8, and 9, we need only say that they are not stated as the rules require. We cannot separate and number assignments where they are merged, and we cannot hunt through transcripts where there are not any references to pages thereof.

4. It is assigned that the court erred in refusing "the motion of defendants to compel the plaintiffs to elect whether they would stand upon the implied contract alleged in the complaint or upon the express contract, and to dismiss the action for the foreclosure of the lien." Reference to the transcript at the page indicated shows that the defendant did not make this motion. The language of the motion as it appears in the transcript is not the language of the assignment, and does not convey the same idea. Therefore we do not find that the court erred as assigned.

5. In assignment numbered 11, appellants say that "it was error to refuse the offer of proof made as to the classification of James M. Robertson, and to refuse to allow the witness Boyce to identify a statement of his classification so that it could be offered in evidence." Examination of the parts of the record referred to shows that the court made three rulings against the appellants. To which of the three the assignment refers, we do not know. The assignment does not conform to the rules, in that the same is a merger. We will say, however, that it seems to be an attempt to prove by Boyce that one Robertson made certain calculations as to the amount of work done, and dictated them to Boyce, and that appellants offered to introduce classi-

fications thus made to show that their own (Wiswell's) final statement was inaccurate. They were objected to as irrelevant, immaterial, and incompetent, and because there was not anything before the court to show that the data given by Robertson to Boyce were correct. We think the court was right in excluding the evidence. Robertson was not a witness on this trial, and there was not any legal reason advanced why his data should have been introduced in the way intended by the appellants. Moreover, as we have said, it was admitted by both sides that Wiswell's statement was not correct.

6. Referring to the twelfth assignment, we find that counsel assembles three alleged errors without setting them out "separately and particularly," as the rules require. Counsel makes a "point of law to be discussed," to-wit, was certain evidence properly rebuttal, or should it have been offered in chief? This point is raised by the assignment of the three alleged errors. We cannot consider what is not properly presented, and therefore we do not find the court in error as suggested. Besides, the order of proof is largely in the discretion of the court.

7. As to assignments numbered 13 to 22, inclusive, relating to the instructions to the jury, refused or given, we need not make any remarks, as the case was one for the final judgment of the chancellor, to whom the findings of the jury were only advisory. The statement contained in *Marsh v. Morgan*, 18 Mont. 19, which was a suit for foreclosure of a mechanic's lien, that the case therein considered was not an equity case, for the reason that there was not any equity issue, is opposed to the holding of this court from the time of the organization thereof up to the date of the adoption of the constitution, and there is not anything in that instrument which changes the rule. A suit to foreclose a mechanic's lien is a proceeding in chancery to be enforced in conformity with the established rules and principles governing proceedings in chancery. (*Mochon v. Sullivan*, 1 Mont. 470; *Simonton v. Kelly*, 1 Mont. 483; *Riale v. Roush*, 1 Mont. 474; *Curnow v. Blue Gravel Co.*, 68 Cal. 262; *Mont. Ore Pur. Co. v. B. & M. C. C. & S. M. Co.*, 27 Mont. 288, 70

Pac. 1114; *Williams v. Uncompahgre Canal Co.*, 13 Colo. 469, 22 Pac. 806, and citations.)

8. Assignment numbered 23 need not be considered.

9. We cannot see that it was error, as alleged in assignment numbered 24, for the court to sustain the objection of the plaintiffs to the question, "What have you to say as to whether the clearing and finishing of the contract * * * has been completed by the plaintiffs?" If defendants wished to make a record of error, they should have told the court what they expected to prove by the witness, and offered to prove it, and take exception to the ruling of the court upon such offer, if it were adverse. So counsel seemed to think, and they did make the offer; but, so far as we can find from the record, the court did not make any ruling upon it, and the matter seems to have been dropped without any further effort to get a ruling upon the offer. In the argument in the brief it is stated that the court excluded the testimony offered. The record does not show that the court excluded any such testimony, for it did not make any ruling upon the offer, as we have said above. We cannot say that the court erred as alleged.

10. Was it "error for the court to find for the plaintiffs," as assigned in assignment numbered 25? The argument in the brief not treating of the assignments *seriatim*, and in many parts thereof not being clear as to what points are discussed, we have found very great difficulty in collating the several sentences and paragraphs which are intended to express the views of counsel as to this and other alleged errors. Such an assignment as the one numbered 25 does not point out or specify any particular finding or decision of the court as erroneous.

11. We take up now assignment numbered 26. Appellants say that the court erred in overruling the demurrer of defendants to the interveners' complaint. The complaint in intervention declares upon contracts with the Gallatin Railroad Company, and a notice of lien upon the property of the Yellowstone Park Railway Company, a corporation, and another notice of lien upon the property of the Yellowstone Park Railroad Com-

pany, a corporation. The complaint in intervention also says, upon information and belief, that the Yellowstone Park Railroad Company and the Gallatin Railroad Company are the same corporation, or substantially the same corporation, and that the Yellowstone Park Railway and the Gallatin Railroad Company are the same corporation, or substantially the same.

Before taking up and considering the several grounds of the demurrer to this complaint in intervention, it is necessary to set forth more particularly the allegations contained in the complaint. Interveners allege in their first cause of action that between August 25 and November 17, 1898, they performed work and labor for the defendant Gallatin Railroad Company (describing it), which work and labor was done at the special instance and request of the plaintiffs, Cook & Woldson. In their second cause of action they say that between September 1 and November 15, 1898, they performed certain work and furnished certain material to the defendant Gallatin Railroad Company at its special instance and request, and that the reasonable value thereof (\$490.93) has been due and owing to the interveners from the Gallatin Railroad Company since November 15, 1898. The interveners pray judgment upon their first cause of action for the sum of \$5,293.47, with interest and attorney's fees, and that they may have a deficiency judgment against the plaintiffs if the property be not sold for enough to pay the full amount of their claim (in other words, they apparently want judgment against the defendants, and a deficiency judgment against the plaintiffs); and upon the second cause of action they pray for judgment for \$490.93, with interest and attorney's fees, with a lien on the property described, and, in the event that the claim of plaintiffs "be established upon the property above mentioned, then in that event, that the proceeds derived from the sale of said property shall be shared equally, *pro rata*, according to the respective amounts so found due plaintiffs and interveners, in case the said proceeds arising from the sale of said property be insufficient to pay said plaintiffs and interveners' claims in full * * *." Of course, the prayer is not part of the complaint;

and it, in part, is introduced herein only for what it is worth, to aid us in arriving at some understanding as to what the complaint in intervention means. Defendants demurred to the complaint in intervention upon the ground, among others, that it did not state facts sufficient to constitute a cause of action. The demurrer attacked the first cause of action upon the ground, among others, that it did not state facts sufficient to constitute a cause of action, and the second cause of action upon the like ground, among others.

We think the demurrer should have been sustained on the ground that the complaint did not state facts sufficient to constitute a cause of action; that is, that there was a want of any reason or ground for intervention in the suit. It is apparent from an examination of all the averments of the complaint in the first cause of action that the interveners never made any bargain with the Gallatin Railroad Company, although they may have done so with some other company; and it is obvious that there is not any basis for a lien in favor of the interveners against the property of the defendant company, for that it is not named in either of the alleged notices, and, further, not having any such basis, the alleged fact that they have a cause of action at law for a money judgment against the defendants, or one of them, is not of itself sufficient to warrant intervention in the suit of plaintiffs to foreclose a lien, however willing the plaintiffs may be to permit the interveners to come in. It is possible to assume from the complaint that the interveners intended to allege that they were subcontractors of the plaintiffs as to the first cause of action, but, considering the complaint with the notices of lien attached thereto, there is not a sufficient statement of a cause of action for the establishment of a lien upon any property belonging to the defendants. In *Missoula Mercantile Company v. O'Donnell*, 24 Mont. 65-75, 60 Pac. 594, 991, the chief justice, speaking for the court, said that it is incumbent upon the claimant to insert the owner's name in the notice of lien which the law requires to be filed in the office of the county clerk. (Section 2131, Code of Civil Procedure.)

The abstract made by the county clerk (Section 2132, Code of Civil Procedure) must contain "the name of the person * * * against whose property the lien is filed." It is no hardship that the claimant shall be required to insert the name of the owner in the notice, says this court in the opinion cited above. "The claimant is bound to know for whom he works, or for whose benefit he is bestowing his materials. If he assumes the risk without inquiry sufficient to enable him to preserve his rights, it is his own fault. The statute gives him ample time to inform himself. Though the statute is remedial in character, its requirements must be complied with. (*Black v. Appolonio*, 1 Mont. 342.)" *M. M. Co. v. O'Donnell*, *supra*. Omission of the name of the owner whose interest is to be charged cannot be supplied by the complaint. (Phillips, Mech. Liens, 345.)

For the foregoing reasons, and under the authority of *Miscula Mercantile Co. v. O'Donnell*, *supra*, and the cases cited by the chief justice therein, and (as to the alleged second cause of action) because the having of a right of action against a defendant (in a certain cause commenced by another) for the recovery of money, merely, without a right of lien, is not ground or reason for intervention in a cause brought by another party against said defendant, we conclude that the demurrer as to each of the alleged causes of action should have been sustained.

For the reasons last above stated, it was error to find for the interveners, as stated in assignment numbered 27.

The decree, for the reasons stated, must, and is, modified by striking out so much thereof as finds for, and decrees any lien in favor of, the interveners, and as modified is affirmed. The interveners will pay one-half of the costs of appeal.

Modified and Affirmed.

MR. JUSTICE HOLLOWAY, having been of counsel in the court below, takes no part in the decision or in this opinion.

SPENCER ET AL., APPELLANTS, v. MUNGUS ET AL.,
RESPONDENTS.

28	357
80	274

(No. 1,590.)

(Submitted May 28, 1903. Decided June 6, 1903.)

Costs—Allowance to Defendant — Order — Right of Appeal.

1. An order, after final judgment for defendant, refusing to disallow his costs, is reviewable on appeal from the judgment, and not on an independent appeal; the costs being a part of the judgment.
2. Code of Civil Procedure, Section 1851, allows costs, of course, to the plaintiff, on his recovering a judgment in excess of \$50 in an action for money or damages. Section 1852 provides that costs must be allowed, of course, to the defendant, upon a judgment in his favor. Section 1853 provides that no costs can be allowed in an action for the recovery of money or damages when the plaintiff fails to recover more than \$50. *Held*, that costs were properly allowed defendant on his recovering \$35 under a counterclaim.

*Appeal from District Court, Granite County; Welling Nap-
tun, Judge.*

ACTION by John A. Spencer and C. C. Spencer, copartners under the firm name of John A. Spencer & Son, against Mike Mungus and A. Blazina, copartners under the firm name of A. Blazina & Co. Judgment for defendants, and plaintiffs appeal. Affirmed.

STATEMENT OF THE CASE.

This action was commenced in the district court of Granite county by the appellants (plaintiffs below) to recover the sum of \$1,118.66, alleged to be due from the defendants for goods, wares and merchandise sold by the plaintiffs to them between May, 1898, and December, 1899. Defendants filed an answer denying the material allegations of the complaint, and, by way of counterclaim, sought to recover judgment against the plaintiffs for \$1,492.98, alleged to be due for moneys loaned and goods sold to and for work done for them by the defendants during the two years next prior to the date of the filing of the an-

swer. All the allegations of the counterclaim were denied by the reply. The cause was tried to a jury, which returned a verdict in favor of the defendants for \$35. From the judgment entered thereon for the amount of the verdict, and including the defendants' costs, the plaintiffs appeal. The notice of appeal states that the appellants also appeal from an order of the district court refusing to strike out and disallow the defendants' costs.

Mr. Josiah Shull, and Mr. W. E. Moore, for Appellants.

Messrs. Durfee & Brown, and Mr. George A. Maywood, for Respondents.

MR. JUSTICE HOLLOWAY, after stating the case, delivered the opinion of the court.

The appellants apparently proceeded upon the theory that the order of the district court refusing to disallow the defendants' costs was an order made after final judgment, and appealable as such. But costs are a part of the judgment, and, in contemplation of law, are settled before being incorporated in the judgment, and any order made with reference thereto is reviewable upon the appeal from the final judgment. (*Mont. Ore Pur. Co. v. Boston & Montana C. C. & S. M. Co.*, 27 Mont. 288, 70 Pac. 1114.)

The only error assigned is the action of the district court in including in the judgment the defendants' costs. It is contended that no costs can be allowed in this action, for the reason that neither party recovered more than \$50. So much of the Code of Civil Procedure as is necessary to be considered in a determination of this question is as follows:

"Sec. 1851. Costs are allowed, of course, to the plaintiff, upon a judgment in his favor, in the following cases: * * * (3) In an action for the recovery of money or damages, exclusive of interest, when plaintiff recovers over fifty dollars.

"Sec. 1852. Costs must be allowed, of course, to the defendant, upon a judgment in his favor in the actions mentioned in the next preceding section. * * *

"Sec. 1853. * * * But no costs can be allowed in an action for the recovery of money or damages when the plaintiff fails to recover more than fifty dollars. * * *

Under Section 1851, above, costs are allowed to the plaintiff only upon two conditions: First, that he prevails in the action; and, second, that his recovery exceeds \$50. Under Section 1852, costs are allowed to the defendant upon a judgment in his favor, whether it be upon a general verdict which merely defeats the plaintiff's right of recovery, or for a definite amount in his favor, however small the amount may be. (*Davis v. Hurgren*, 125 Cal. 48, 57 Pac. 684; *Dows v. Glaspel*, 4 N. D. 251, 60 N. W. 60.) Under Section 1853, which is the corollary of the other two, neither party is allowed costs when the plaintiff prevails in the action, but his recovery does not exceed \$50. This is the construction placed upon a like provision by the Supreme Court of California in *Anthony v. Grand*, 101 Cal. 235, 35 Pac. 859. In that case the plaintiff prevailed, but recovered less than the amount necessary to carry costs, and the defendant contended that in that event he (defendant) should recover his costs. In disposing of the question the court said: "Our statute provides that 'no costs can be allowed in an action for the recovery of money or damages when the plaintiff recovers less than three hundred dollars.' (Code Civil Procédure, Sec. 1025.) This evidently applies to both parties to the action, and forbids the recovery of costs by either of them."

In this case the defendants recovered judgment, and, under the provisions of Section 1852, above, are entitled to have included in that judgment their costs. The provisions of Section 1853, above, have no application whatever to the facts of this case. That section only applies when the plaintiff recovers judgment, but the amount of his recovery does not exceed \$50. Costs are the creatures of statute. They were not allowed at all, *eo nomine*, at common law; and the

particular items of expense incident to a trial which may be denominated costs, as well as the conditions prescribed under which they may be allowed to one party or another, are subject to legislative change and control in consonance with the provisions of the state constitution. (*Mont. Ore. Pur. Co. v. Boston & Montana C. C. & S. Min. Co.*, above.)

The appeal from the order refusing to disallow the defendants' costs is dismissed, and the judgment affirmed.

Affirmed.

WILLIAMS ET AL., APPELLANTS, v. BOARD OF COMMISSIONERS OF BROADWATER COUNTY
ET AL., RESPONDENTS.

(No. 1,602.)

(Submitted June 1, 1903. Decided June 8, 1903.)

County Commissioners — Powers — Contracts — Suits—Employing Counsel—County Not a Party.

1. A contract with an attorney for his services, entered into by the chairman of the board of county commissioners, individually, is not binding on the county, where the first and only action of the board with reference thereto, is the allowing of a portion of the attorney's claim for legal services rendered in pursuance of the contract, since the commissioners have power to bind the county only where they act as a legal entity.
2. If under Political Code, Section 4230, the board of county commissioners has power to employ counsel (which is not decided), it has none whatever to employ counsel to prosecute a suit by an employe of the board against an officer of the county, where the county is not a party to the suit.

Appeal from District Court, Broadwater County; F. K. Armstrong, Judge.

E. A. CARLETON presented a claim to the board of county commissioners of Broadwater county. From the action of the board in allowing part of the claim, David T. Williams and

other taxpayers appealed to the district court, which rendered judgment against appellants; from which judgment, and from an order denying a motion for a new trial, they appeal. Reversed.

Mr. E. H. Goodman, for Appellants.

The board of county commissioners must cause to be kept in suitable books a record of all their official acts. (Sec. 4219, Political Code.) To prove these official acts the records themselves would undoubtedly be the best evidence. (Secs. 3208 and 3204, Code of Civil Procedure; *Belk v. Meagher*, 3 Mont. 65.)

"Boards of commissioners are the general public agents by which the powers of counties are exercised, but, being creatures of statute, they can exercise only such powers as are expressly conferred upon them, or are necessary to the performance of their public trusts and duties." (Am. & Eng. Ency. of Law (2d Ed.), Vol. 7, p. 976, and note; *Thomas v. Smith*, 1 Mont. 1; *Morris v. Multnomah Co.*, 18 Ore. 163.)

"A grant of powers to such corporation must be strictly construed." (Am. & Eng. Ency. of Law (2d Ed.), Vol. 7, p. 976, note 3.)

"A board of county commissioners can act only when convened as a board in legal session, either regular, adjourned, or special, as may be provided by statute." (Am. & Eng. Ency. of Law (2d Ed.), Vol. 7, p. 979, and note; *Eigemann v. Posy Co.*, 82 Ind. 413; *Paola, etc. R. Co. v. Anderson Co.*, 16 Kan. 303; *Anderson Co. v. Paola, etc. R. Co.*, 20 Kan. 534; *Hamilton County v. Webb*, 47 Kan. 104; *Willis v. Webb*, 27 Pac. 825.)

We are willing to concede that county commissioners can employ counsel to prosecute or defend an action to which the county is a party, but it is conceded that the county was not a party to the cases of *Coad v. Lambert*. No necessity for the employment of Carleton was shown. (*Miller v. Board of Commissioners*, 35 Pac. 712.)

Even when commissioners employ counsel other than the county attorney to prosecute or defend an action to which the county is a party, this must be done at a regular or special meeting of the board. The employment must be the act of the legal entity: the "board," and not the act of the individuals constituting the board. As county commissioners are but agents of the county, they cannot delegate their powers to another agent, particularly in cases where the exercise of their powers involves reason and discussion. "The board of county commissioners of a county cannot delegate its powers * * * to obtain attorneys to manage the prosecution of suits to which the county is a party, nor to abdicate its control of such a suit." (*House v. Los Angeles Co.*, 104 Cal. 79; *Smith v. Los Angeles Co.*, 99 Cal. 628; *Scollay v. County of Butte*, 67 Cal. 249.) County commissioners, if authorized by statute (and not otherwise) may appoint an agent to discharge ministerial duties not calling for the exercise of reason or discussion, but cannot go beyond this and delegate to others, duties, the discharge of which, calling for the exercise of reason and discretion, are regarded as public trusts. (*House v. Los Angeles Co.*, 104 Cal. 79; *People v. Town of Linden*, 107 Cal. 94; *Scollay v. County of Butte*, 67 Cal. 249.)

"Contracts made by public officers, as county commissioners of a county, obtain validity only by force of the law authorizing their making, and persons contracting with such officers are charged with knowledge of their lawful power and the extent of their authority." Any contract beyond the scope of the corporate power is void. (*Lebcher v. Commissioners of Custer Co.*, 9 Mont. 315; *Parr v. Village of Greenbush*, 72 N. Y. 472; 1 Dillon on Municipal Corporations, 457; *Zoltman v. San Francisco*, 20 Cal. 105; *Morris v. Multnomah Co.*, 18 Ore. 163; *State v. Superior Court, etc.*, 4 Wash. 34.)

Commissioners in allowing bills cannot act arbitrarily, but must be controlled by legal considerations. (*David v. Commissioners*, 4 Mont. 292.)

By Subd. 15 of Section 4230, Political Code, the power of the commissioners is expressly limited to the direction and control of suits to which the county is a party.

It was claimed by respondents in the court below that the allowance of Carleton's bill by the commissioners ratified the contract and that in consequence of such ratification the county became liable. If the county had been beneficially interested and the contract was one within the scope of the authority of the commissioners, and not void, the commissioners by accepting the benefits arising therefrom, if any, might ratify a legal contract made by an unauthorized agent, but simply ordering the bill paid would not be a ratification, neither would it be "accepting the benefits arising from the contract." To hold that the allowance of an illegal claim against a county is a ratification of the contract on which the claim was based, would be holding that the power of county commissioners is unlimited by any legal consideration in matters of this kind.

"A void indebtedness against the county can only be made valid by legislative authority." (*Hunt v. Fawcett*, 8 Wash. 399.)

"A claim will not be enforced against a county unless it is authorized by some plain provision of law." (*State v. Superior Court, etc.*, 4 Wash. 34.)

Claims against the county which are legally chargeable alone can be allowed by the supervisors. (*Linden v. Case*, 46 Cal. 171; *Foster v. Colman*, 10 Cal. 278; Sec. 4285, Political Code.)

A contract void at its inception cannot be legalized by ratification. (*Hunt v. Fawcett*, 8 Wash. 399; *Smith v. Los Angeles Co.*, 99 Cal. 628; *Zottman v. San Francisco*, 20 Cal. 97.)

MR. COMMISSIONER CALLAWAY prepared the opinion for the court.

It appears from the record that the board of county commissioners of Broadwater county, at a special meeting held in

January, 1899, employed George Lambert and another to index the records of their county, and ordered the county clerk to give Lambert and associate access to his office and to the records therein. This the county clerk, upon the advice of the county attorney, refused to do. After the adjournment of the board Durnen, its chairman, met Lambert upon the street, and directed him to employ counsel for the purpose of bringing an action against the county clerk, saying that the county would pay the bill. The board of county commissioners, while in session, never authorized Lambert, or any other person, to employ counsel. Under the direction given, Lambert employed E. A. Carleton, and Durnen afterwards saw Carleton concerning it. Application was then made to the district court, in behalf of Lambert, for a writ of mandate to compel the county clerk to give the desired access to his office and records. The case finally reached the supreme court, where the application of Lambert was denied, on the ground that his contract with the board was void. (*State ex rel. Lambert v. Coad*, 23 Mont. 131, 57 Pac. 1092.) Thereafter Carleton presented his account against Broadwater county, claiming the sum of \$255.50 "for legal services and expenses in the conduct of the cases of *Lambert v. Coad* and *Coad v. Lambert*, which cases were tried in the district court of Broadwater county and the supreme court of the state." During their September, 1899, session, the board allowed Carleton one-half of his claim. From this action David T. Williams and other taxpayers of Broadwater county appealed to the district court, which rendered judgment against appellants, and ordered the board to pay Carleton's bill as theretofore allowed. From such judgment, and an order denying a motion for a new trial, Williams and others appeal to this court.

From the foregoing facts it will be seen that the board of county commissioners of Broadwater county did not employ, or authorize any one to employ, Carleton.

"Each county must have a board of county commissioners consisting of three members." (Political Code, Sec. 4210.) "All meetings of the board must be public, and the books,

records, and accounts must be kept at the office of the clerk, open at all times for public inspection, free of charge." (*Id.* Sec. 4216.) The board must hold four regular sessions each year, at the county seat. (*Id.* Sec. 4220.) "If at any time after the adjournment of a regular meeting the business of the county requires a meeting of the board, a special meeting may be ordered by a majority of the board. The order must be entered of record, and five days' notice thereof must by the clerk be given to each member not joining in the order. The order must specify the business to be transacted, and none other than that specified must be transacted at such special meeting." (*Id.* Sec. 4215.)

This board, having supervision over the official conduct of all county officers, and generally over all county business, is one of considerable dignity and power; and the statutes contemplate that its meetings shall be held and conducted in an orderly and businesslike way. To bind the county by its contracts, it must act as an entity, and within the scope of its authority. Its members may not discharge its important governmental functions by casual sittings on drygoods boxes, or by accidental meetings on the public streets; and its chairman, unless lawfully authorized by the board to do some act, or acts, has no more power than has any other member of the board. The statutes do not vest the power of the county in three commissioners acting individually, but in them as a single board; and the board can act only when legally convened. (*Paola & Fall River Railway Co. v. Commissioners*, 16 Kan. 302; 7 Am. & Eng. Ency. Law (2d Ed.), 979.) And its minutes should be kept in such manner as to give true and correct information to all inquiring concerning county affairs.

As shown by its minutes, the first and only action ever taken by the board with reference to Carleton's services was when it ordered a portion of his claim paid.

But, had the contract between Carleton and the board been entered into in a regular manner, yet it was void. The board has power "to direct and control the prosecution and defense

of all suits to which the county is a party." (Political Code, Sec. 4230.) If it has power to employ counsel under this statute, which we do not decide, it has none whatever so to do in a case to which the county is not a party. It must not exceed the authority vested in it by statute. (*State ex rel. Lambert v. Coad*, 23 Mont. 131, 57 Pac. 1092; *Lebcher v. Board of Commissioners of Custer County*, 9 Mont. 315, 23 Pac. 713.) It is conceded that Broadwater county was not a party to the actions in which Carleton rendered the services in question.

We are therefore of the opinion that the judgment and order should be reversed, and the cause remanded.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order are reversed, and the cause remanded.

28 306
29 508

STEVENS ET AL., RESPONDENTS, v. CURRAN ET AL.,
APPELLANTS.

(No. 1,591.)

(Submitted May 29, 1903. Decided June 8, 1903.)

Chattel Mortgages—Possession by Mortgagor—Effect—Fraudulent Mortgage — Rights of Purchasers—Lien—Conversion—Demand—Complaint.

- 1 Findings of fact by a trial court, based on conflicting evidence, will not be disturbed on appeal.
- 2 Where a chattel mortgagee permitted the mortgagor to retain possession of the goods, and to sell and dispose of them without accounting for the proceeds to the mortgagee, the mortgage was fraudulent as to creditors and subsequent purchasers from the mortgagor in good faith.
- 3 Where it was claimed that a chattel mortgage was void as to subsequent purchasers of the goods mortgaged, by reason of the fact that the mortgagor was permitted to remain in possession and sell the goods without accounting to the mortgagee, extrinsic evidence was admissible to show the conditions actually existing and the conduct of the parties with reference to the mortgaged property.

- 4 Where plaintiffs purchased certain goods covered by a chattel mortgage from the mortgagor, and retained actual possession of them, and the court found that the sale to plaintiffs was valid. It was not necessary for plaintiffs to obtain a judgment or levy an attachment on the goods as a condition precedent to their right to assail the mortgage in an action against the sheriff for seizing the goods thereunder.
- 5 Where the act of a sheriff in seizing goods under a mortgage from plaintiffs, who were purchasers thereof from the chattel mortgagor, was wrongful in the beginning, no demand was necessary to entitle plaintiffs to sue the sheriff for conversion of the goods.
- 6 In an action for conversion, an allegation that defendants converted and disposed of the property to their own use is an allegation of fact sufficient, in the absence of a special demurrer, to sustain a judgment for plaintiff.
7. In determining the rights of third persons, the instrument and the conduct of the parties thereto must be looked to, irrespective of the intention of the mortgagor or mortgagee.

Appeal from District Court, Missoula County; F. K. Woody, Judge.

ACTION by A. M. Stevens and others against D. T. Curran, sheriff, and others. From a judgment in favor of plaintiffs, and from an order overruling a motion for a new trial, defendants appeal. Affirmed.

Mr. W. J. Stephens, for Appellants.

The sheriff can justify the taking of this property under process and is not liable without a demand for the return of the property before suit. Process regular is always justification without demand. Where the taking is tortious no demand is necessary. But the taking of property under Section 3872 of the Civil Code is not tortious. By that section the officer is commanded and it is made his duty to take the property described in the mortgage wherever found, not confined even from the defendant, but wherever found. He acts under the mortgage just as he would under a writ of replevin. In both instances there is a taking of specific chattels by authority of law, and in discharge of his duty. If the officer takes property in replevin, he is under the statute, Civil Procedure, Sec. 854, entitled to a demand by the claimant.

Because the plaintiff brings an action of trover instead of replevin, it does not change the nature of things. One action

for the wrongful taking of specific articles and the other damages for the wrongful taking of the same chattels. In both instances the unlawful or wrongful taking is the gist of the action. It is laid down as a rule by some courts that in an action for the recovery of personal property, the plaintiff makes his case when he shows title or right of possession in himself, and an unlawful detention by the defendant, but in all these cases the rule is only applied when a third party, not an officer acting under special process against the thing, takes and detains the property. *Voss v. Whitney*, 7 Mont. 385, holds that taking possession of mortgage chattels is an official taking. On demand general, see *Daniel v. Gorham*, 6 Cal. 44; *Taylor v. Seymour*, 6 Id. 512; *Rilley v. Scannell*, 12 Id. 73; *Bacon v. Robson*, 53 Id. 399; *Laurence v. Coyne*, 62 Id. 124. And on justification by an officer, see *Ballis et al. v. Montgomery et al.*, 50 N. Y. Rep. 353. Also, *Manning, Bowman & Co. v. Kennanet et al.*, 73 N. Y. Rep. 46; *Fleming v. Wells*, 65 Cal. 366; *Laurence v. Coyne*, 62 Id. 124.

Again, the plaintiffs are not in a position to attack the mortgage for fraud as creditors or subsequent purchasers for value. A general creditor whose claim is not merged in a judgment cannot attack the mortgage for fraud. (*People's Savings Bank v. Bates*, 120 U. S. Sup. Ct. Rep. 556; *Geery et al. v. Geery et al.*, 63 N. Y. 253; *Southard v. Benner*, 72 Id. 424; *Jones et al. v. Graham*, 77 Id. 628; *Clute v. Steele*, 6 Nev. 335.)

Nor can they do so as subsequent purchasers. The statutory use of the words subsequent purchaser means a subsequent purchaser in good faith, that is for a valuable consideration without notice. There must be a new consideration at the time of the transfer and not merely a settlement of a pre-existing indebtedness. (*Kohl v. Lynn*, 34 Mich. 360; *Jones et al. v. Graham*, 77 N. Y. 628; *People's Savings Bank v. Bates*, 120 U. S. 556, and cases cited; *Clute v. Steele*, 6 Nev. 335.)

Under our statute fraudulent intent is a question of fact and not one of law. Being a question of fact, that issue should have been raised by the pleadings. The pleadings raise no such issue;

hence no extrinsic evidence should have been admitted on the question. (*Territory v. Virginia Road Co.*, 2 Mont. 100, 101, 109, and cases cited therein; also, *Purcy v. Sabin*, 10 Cal. 28; *Jerome v. Stebbins*, 14 Id. 457; *Green v. Palmer*, 15 Id. 415; *Tessot v. Darling*, 9 Id. 285; *Levinson, v. Schwartz*, 22 Id. 229.)

Mr. J. M. Dixon, for Respondents.

MR. COMMISSIONER POORMAN prepared the opinion for the court.

This is an action in conversion, originally commenced in a justice court of Missoula county, and taken by appeal to the district court of said county, where a trial was had by the court sitting without a jury, and judgment was rendered for plaintiffs. From this judgment, and the order of the court overruling a motion for a new trial, the defendants appeal.

The findings of fact made by the trial court are to the effect that one Mae Carrier, who was at that time engaged in the mercantile business at the city of Missoula, borrowed \$500 from defendant W. J. Stephens, for which she gave her promissory note, and at the same time executed as security for payment of said note a chattel mortgage on her stock of merchandise, with a provision that the mortgage should extend to certain other articles of merchandise and store fixtures to be thereafter purchased by the mortgagor; that the mortgage further provided that the mortgagor might remain in possession of the mortgaged property and carefully use the same, but that she should not sell or dispose of said property, or any part thereof, or allow it to be taken from her possession by legal process or otherwise; that the mortgagor, after the execution of the mortgage, remained in the possession of the stock of merchandise, and sold and disposed of the same in the usual course of trade, and purchased other goods, and added to the stock in her store; that the defendant Stephens had full knowledge of the sale of the merchandise, and knew of the manner in which the mortgagor was

conducting the business and disposing of the merchandise, and that he made no objection to the same, but acquiesced therein; that no provision was made in the mortgage for an accounting by the mortgagor for any of the proceeds of the property sold, and that no part of the proceeds was applied to the payment of the debt secured by the mortgage, except the payment of the interest on the note; that the mortgagor, after the execution of the mortgage, continued, with the knowledge of defendant Stephens, to conduct the business and to sell the goods in the same manner as though the mortgage had not been executed; that the plaintiffs purchased from the said mortgagor, while she was so conducting the business, certain goods, wares and merchandise, and by their agent took actual possession of the goods so purchased; that while they were in such possession, and after such purchase had been completed, the defendants Curran and Violette, acting as the sheriff and undersheriff of the county, and over the protest of the plaintiffs, took the goods from the plaintiffs under said chattel mortgage, at the request of the defendant Stephens, the mortgagee. At the time of the seizure the plaintiffs notified the sheriff that the mortgage was void as to the goods so purchased by them, but were informed by the sheriff that his duty required him to take possession of the goods, and that they could bring suit against him or defendant Stephens to recover the same. It further appears from the record that the sheriff is still holding these goods.

The findings of the court are based either upon admissions by the parties, or upon evidence with respect to which there is substantial conflict; and, as has been repeatedly held by the supreme court of this state, cannot be disturbed under such circumstances. (*Merchants' Nat'l Bank v. Greenhood*, 16 Mont. 430, 41 Pac. 250, 851; *Sanford v. Gates, Townsend & Co.*, 21 Mont. 288, 53 Pac. 749.)

It is claimed by the respondents that the mortgage is fraudulent, as to creditors and subsequent purchasers in good faith, by reason of the mortgagor being permitted to remain in possession of the goods, and to sell and dispose of them without

making an accounting to the mortgagee. The appellants contend that the mortgage is valid on its face, and that by its terms the sheriff had the right to seize the goods, and that respondents could not attack the mortgage until they had first obtained a judgment, and that a demand on the sheriff was necessary before an action could be maintained.

In *Rocheleau v. Boyle*, 11 Mont., on page 469, and 28 Pac., on page 878, the court, in passing on the question as to the validity of a mortgage, where the mortgagor remained in possession and disposed of the goods, says: "If a mortgage of goods be made, as provided by statute, leaving possession with the mortgagor, and it be understood, agreed, or knowingly permitted (for, if it is knowingly permitted, it is understood and agreed) to the mortgagor to place the mortgaged goods on sale, not subject to the mortgage, to be sold, carried away, or consumed, and to use the proceeds without reference to the mortgage, this arrangement annuls every vital element of the mortgage, so far as concerns the goods to which such arrangement or permission extends. The mortgage, under such circumstances, becomes a mere sham, a mere appearance, a delusion, asserting in form what is not in fact, as admitted by the conduct of the parties. The possession does not remain. Nor does the property remain. It is shifted over to those who will come and buy, and is carried away without respect to the mortgage; * * * and we think there ought to be no hesitation in holding the mortgage void as to property so dealt with, or, in other words, that such property is put out from under such mortgage by the conduct of the parties in relation to it." This is in effect a holding that the mortgage, while valid as between the parties, has by the conduct of the parties been released as to the property sold by the mortgagor.

Extrinsic evidence is admissible to show conditions actually existing, and the conduct of the parties with reference to the mortgaged property. It is true, the statute has been slightly changed since the decision in *Rocheleau v. Boyle*, but no change has been made conflicting with the doctrine announced in that

case, as above quoted. It is likewise true that a prowling creditor cannot attack a conveyance or sale on the ground of fraud; but, whenever the creditor acquires a lien on the goods, he may then attack the conveyance or the sale, in the protection of his lien and his rights.

The plaintiffs claim these goods as purchasers. They obtained actual possession of them. The sale to them was declared by the court to be valid, and under such circumstances it was not necessary for them to obtain judgment or levy an attachment as a condition precedent to assailing the mortgage. (*Westheimer v. Goodkind*, 24 Mont. 90, 60 Pac. 813.)

Had this mortgage contained a provision that the mortgagor was to account to the mortgagee for the proceeds of sales made, the doctrine as announced in *Noyes v. Ross*, 23 Mont. 425, 59 Pac. 367, 47 I. R. A. 400, 75 Am. St. Rep. 543, might apply; but the mortgage contains no such provision, nor does the evidence establish that there was any agreement or understanding that there should be any such accounting, or that any accounting ever was made.

The taking by the sheriff of these goods from the purchasers, the plaintiffs, was wrongful in the beginning, and in an action of this kind, and under such circumstances, a demand is not necessary prior to the bringing of suit.

In *Daggett v. Gray*, 110 Cal. on page 171, 42 Pac. on page 568, which was an action in conversion, the court says: "If the relation of the defendant to the property is such that a previous demand is essential in order to establish conversion on his part, proof of such demand must be made at the trial; but the demand need not be alleged. The allegation that the defendants 'converted and disposed of the property to their own use' is the allegation of a fact sufficient, in the absence of a special demurrer, to sustain a judgment. Upon the trial of an issue, on this averment, the plaintiff would be at liberty to introduce evidence of a demand and refusal, if such evidence were sufficient or necessary to establish the conversion; and he would also, under this averment, be authorized to offer evidence

that the defendants had sold or otherwise dealt with the property in repudiation of the claim of the plaintiff." The complaint in this action contains this specific allegation, and comes clearly within the decision in the case just quoted. (See, also, 21 Enc. P. & P. 1083.)

There is no contention made in this case that there was any intent on the part of the defendants or the mortgagor to defraud creditors or subsequent purchasers; but the instrument and the conduct of the parties thereto must be looked to in determining the rights of third persons, irrespective of the intention of the mortgagor or the mortgagee. The mortgagee's intention undoubtedly was to assist the mortgagor, and to enable her to carry on her business and to add to her stock of goods and he probably relied more upon her ability to pay than he did upon enforcing payment under and by virtue of the terms of his mortgage. His good intention in the matter is not questioned, but the principles of law involved have been so long established that we cannot recommend that the court now disturb them.

We are therefore of the opinion that this judgment should be affirmed.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment of the court below is affirmed.

DAHLMAN, APPELLANT, v. DAHLMAN ET AL.,
RESPONDENTS.

(No. 1,593.)

(Submitted June 1, 1903. Decided June 15, 1903.)

28	873
28	880
28	873
36	519

Descent and Distribution—Rights of Widow—Heir of Husband—Dower—Election—Merger.

The wife's right to dower or election under Sections 228 and 236 (Civil Code), are separate from her rights as an heir of her husband under Section 1852, and hence the fact that she participated in the distribution of the estate as an heir of her husband does not constitute a waiver of the right of election to take one-half of the residue after payment of debts, under Section 236.

Appeal from District Court, Jefferson County; M. H. Parker, Judge.

ACTION by Anna Dahlman against Emil Dahlman and another. From a judgment in favor of defendants, plaintiff appeals. Reversed.

STATEMENT OF THE CASE.

This proceeding was instituted by the plaintiff, the widow of Henry Dahlman, deceased, under Section 3070-3081 of the Code of Civil Procedure, for the purpose of having allotted to her dower in the estate of her husband in accordance with the provisions of Sections 228-244 of the Civil Code, relating to dower. Upon the pleadings filed in the district court, which consist of a complaint, answer, and replication, no issues of fact arise. That court, after consideration of the material facts therein alleged and admitted, rendered and caused to be entered a judgment in favor of the defendants, holding, in effect, that the widow, under the facts stated, cannot claim one-half of the entire estate of her deceased husband by right of succession under Section 1852 of the Civil Code, and at the same time have the benefit of dower, or her election in lieu thereof, as provided in Section 236 of the same Code.

The facts necessary to an understanding of the controversy are the following: Henry Dahlman died intestate in Jefferson county on February 15, 1899, leaving surviving him his widow, the plaintiff, and his father and mother, the defendants. There were no children nor grandchildren. The plaintiff was appointed administratrix, and, after qualifying, proceeded to the discharge of her duties. The estate consisted of a large amount of real and personal property. A portion of the real estate was

in mines, which, at the death of the intestate, were, and since that time have been, paying dividends. The fund accumulated from that source amounts to \$4,664.14 now in the hands of the administratrix. After stating these facts, the complaint alleges: That the plaintiff has not assigned, waived, nor relinquished, nor in any manner abandoned, her dower in the said lands, or her interest in the rents, issues, and profits thereof; that her interest therein has not been assigned or set over to her; that she is entitled to and demands and elects to take one-half of the said lands, with the rents, issues, and profits thereof accruing since the death of her husband, absolutely and in her own right, subject to the payment of the debts of the estate, as provided in Section 236 of the Civil Code, without prejudice to her rights as heir of her husband in the residue of the estate; and that the plaintiff has demanded of the defendants that her interest in the said lands and the accrued rents, issues, and profits thereof be set over to her, but that the defendants have refused her said demands, or to give their consent that the court having jurisdiction of the administration of the estate may accord to her her rights in the premises. It is admitted that there has been a partial distribution of the estate, and that the plaintiff shared therein, taking a one-half interest in the portion distributed by virtue of her right as heir of her husband.

As before stated, upon these facts the court held that by virtue of her participation in the distribution of the estate as heir of her husband she thereby waived her right of election to take one-half of the residue of the estate as dower under the provisions of Section 236 of the Civil Code, *supra*. From the judgment rendered, the plaintiff has appealed.

Messrs. Walsh & Newman, for Appellant.

Mr. George F. Cowan, and *Mr. A. J. Craven*, for Respondents.

MR. CHIEF JUSTICE BRANTLY, after making the foregoing statement, delivered the opinion of the court.

The only question submitted to this court for decision is whether, when the husband dies intestate, without children or grandchildren living surviving his widow and one or both parents, the widow is entitled to one-half of the estate under the statute relating to succession, in addition to her right of dower, or election in lieu thereof, under Section 236 of the Civil Code, *supra*. The solution of this question depends upon a construction of Sections 228, 236, and 1852, *supra*, in the light of other provisions of the Code touching the subjects to which these sections relate. These provisions are the following:

"Sec. 228. A widow shall be endowed of the third part of all lands whereof her husband was seized of an estate of inheritance at any time during the marriage, unless the same shall have been relinquished in legal form. When a wife joins with her husband in the execution of any conveyance of land, she thereby relinquishes her inchoate right, and shall not thereafter have dower therein, except in case of sale under mortgage signed and executed by herself and husband she shall have a right of dower in the surplus. Equitable estates shall be subject to the widow's dower, and all real estate of every description, contracted for by the husband during his lifetime, the title to which may be completed after his decease."

"Sec. 236. If a husband die, leaving a widow, but no children, nor descendants of children, such widow may, if she elect, have, in lieu of her dower in the estate of which her husband died seized, whether the same shall have been assigned or not, absolutely and in her own right, as if she were sole, one-half of all the real estate which shall remain after the payment of all just debts and claims against the deceased husband: provided, that, in case dower in such estate shall have been already assigned, she shall make such new election within two months after being notified of the payment of such claims and debts."

"Sec. 1852. When any person having title to any estate not limited by marriage contract, dies without disposing of the estate by will, it is succeeded to and must be distributed, unless otherwise expressly provided in this Code and the Code of Civil

Procedure, subject to the payment of his debts, in the following manner: * * * (2) If the decedent leave no issue, the estate goes one-half to the surviving husband or wife, and the other to the decedent's father and mother in equal shares, and if either be dead, the whole of said half goes to the other. * *"

It will be observed that Chapter III, Title I, Part III, Division 1, of the Code of which Sections 228 and 236 are a part, treats exclusively of the obligations, rights, and duties of the husband and wife, including the dower rights of the wife. The express provision of Section 228 is that she shall be endowed of the third part of all lands wherein her husband was seized of an estate of inheritance at any time during the marriage, including equitable and all other estates in land of whatever description. This provision is without restriction or limitation. It attaches to all lands falling within the description, unless the wife shall have relinquished her right in legal form. This may be done only by her deed executed and duly acknowledged in conformity with the law, or by the acceptance by her of a devise or bequest under the will of her husband under Section 234, or by a jointure settled upon her, with her assent, by her husband, before the marriage, under the provisions of Sections 239 and 240. Title VII, Part IV, Division II, of which Section 1852 forms a part, deals exclusively with the subject of succession, and neither has nor purports to have anything to do with the rights, duties, and obligations of the husband and wife. The aims and purposes had in view by the legislature in enacting these different parts of the Code and the specific provisions therein are wholly separate and distinct from each other. The former recognizes the common-law right of dower. At the same time it extends this right to estates to which it did not attach at the common law, and enlarges the wife's right by the election granted to her under Section 236. By this provision she has the absolute right to take in fee, in lieu of the common-law dower, one-half of all the real estate, subject to the payment of debts lawfully due from the estate. This estate falls to her, not as heir, or by will of her husband, but by virtue of her marital

right, and without regard to the law relating to the rights of heirs, or to any will made by the husband. After the right has become fixed by the death of the husband, she can assert it despite the rights of creditors, heirs, or any person whomsoever; and the only restriction upon the right of election granted under Section 236 is that there be no children or grandchildren, and that, in case she chooses the second alternative, the rights of the creditors must first be satisfied. The provisions of Title VII, referred to, have to do with the rights of heirs only, and the course of succession to property where the owner dies without a will. This title grants to the widow the right of succession, and this right given to her rests upon exactly the same ground as that of any other heir. Nor does any provision therein impose, directly or by implication, any condition or restriction upon the right of dower. The two rights, though conferred by statute, rest upon different principles, and exist independently of each other; and the right of election given the widow under the circumstances contemplated by Section 236 has no connection with the right to take as heir one-half of the residue of the estate, real and personal, after the claims of creditors are satisfied. It is true that when the fee to her portion in lands has vested in her under the right of succession, the dower right in such property is *pro tanto* merged in the fee; but this in no wise affects her right to dower in the residue of the estate. This descends to the heirs subject to her rights, and, though she falls within the class of those who, under the statute, are denominated "heirs," this does not affect her rights conferred by the provisions of other sections which have no connection whatever with the law of succession. It follows that the district court was in error in holding as it did.

The judgment is reversed, and the cause is remanded, with directions to proceed according to the views herein expressed.

IN RE DAHLMAN'S ESTATE.

(No. 1,607.)

(Submitted June 1, 1903. Decided June 15, 1903.)

Probate—Jurisdiction of Court—Dower.

When a court is exercising its probate jurisdiction, it has no power with reference to dower, and can make no orders affecting a widow's dower right.

Appeal from District Court, Jefferson County; M. H. Parker, Judge.

ANNA DAHLMAN appeals from an order of final distribution in the estate of Henry Dahlman. Affirmed.

Messrs. Walsh & Newman, for Appellant.

Mr. George F. Cowan, and Mr. A. J. Craven, for Respondents.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This matter comes before this court upon an appeal from an order of final distribution. At the time the order was made, Anna Dahlman, appellant in her own right, requested that the court embody in it a statement that it was made without prejudice to her rights under the provisions of the Civil Code relating to dower, and her right of election in lieu thereof under Section 236 of that Code. This the court refused to do, because the judge was of the opinion that, having elected to share in the estate as heir under the statutes relating to succession (Civil Code, Section 1852 *et seq.*), the appellant had thereby waived her claim to dower.

Whether the court erred in refusing to embody in the order this reservation is the only question upon which a decision is

sought. The rights of the appellant in the premises were settled and determined by this court in the case of *Dahlman v. Dahlman* (this day decided), *ante* p. 373, 72 Pac. 748. We are of the opinion that she suffered no prejudice by the order as made. We have not been able to find any provision in the Title (Title XII) of the Code of Civil Procedure relating to probate proceedings, giving to the court, when sitting in probate, jurisdiction of any matter touching the admeasurement of dower. The jurisdiction upon this subject is conferred upon the court as a court of general jurisdiction, and it must be invoked by an independent action under the provisions of Title XIII of the Code of Civil Procedure. The remedy therein provided is, we think, exclusive. The court, when exercising its probate jurisdiction, has, therefore, no power with reference to dower, and no order which it may make touching the distribution of property during the course of administration can, of itself, affect the right of dower in any lands to which the right has attached, or any election which the widow has with reference to it. She may bring her action to have her dower allotted to her, notwithstanding the order of distribution makes no mention of her right. This being the case, the court committed no error in making the order, though the reason for its action in the premises was not correct. The order is therefore affirmed.

Affirmed.

28 380
332 106

GREENE, RESPONDENT, v. MONTANA BREWING COMPANY, APPELLANT.

(No. 1,599.)

(Submitted June 1, 1903. Decided June 15, 1903.)

Bankruptcy — Preferences — Knowledge of Creditor — Judgments—Satisfaction Before Bankruptcy—Proceeds of Execution Sale — Recovery by Trustee — Complaint — Appeal—Transcript — Unnecessary Matter — Dismissal of Appeal—Cost of Printing—Rules of Supreme Court.

- 1 Bankruptcy Act (Act of Congress July 1, 1898), Section 60b, provides that if a bankrupt shall have given a preference within four months before the filing of the petition, or after filing the petition and before adjudication, and the person receiving it shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, etc. *Held*, that where a petition to avoid an alleged preference failed to allege that the preferred creditor had reasonable cause to believe that the bankrupt by suffering judgment to be recovered intended to give such creditor a preference, within the meaning of the bankruptcy act, it was insufficient, since the burden of proof was on the petitioner to sustain such proposition.
- 2 Bankruptcy Act (Act of Congress July 1, 1898), Section 67f, provides that certain liens, including judgment liens obtained through legal proceedings against an insolvent within four months prior to the filing of a bankruptcy petition against him, in case he is adjudged a bankrupt, shall be void, and the property affected shall pass to the trustee. *Held*, that such section affects only the lien of a judgment recovered within four months before the filing of a bankruptcy petition, and not the judgment itself, and hence, where property had been sold under execution, and the judgment satisfied, before the filing of the petition, there was no judgment lien which could be released, within such section, and the trustee was not entitled to recover against the creditor thereunder the proceeds of the property so sold.
- 3 The unnecessary incorporation of formal parts of pleadings, writs, and other papers in the transcript on appeal, in violation of Supreme Court Rule VII, is not ground for dismissal of the appeal.
- 4 Where appellant unnecessarily incorporated formal parts of pleadings, writs and other papers in the transcript on appeal in violation of Supreme Court Rule VII, he was not entitled to recover the expense of printing that portion of the transcript so incorporated.

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

ACTION by Howard S. Greene, as trustee in bankruptcy of Chris Peterson, against the Montana Brewing Company. From a judgment in favor of plaintiff, defendant appeals. *Reversed.*

STATEMENT OF THE CASE.

This is an action in conversion brought by a trustee in bankruptcy against the Montana Brewing Company to recover the sum of \$534.25. The complaint alleges that on August 17, 1899, the Montana Brewing Company commenced certain actions against one Chris Peterson; that writs of attachment were issued, and certain personal property belonging to Peterson seized thereunder; that judgments were recovered by the brewing company against Peterson, executions issued, and on August 28, 1899, the attached property was sold for \$534.25, and the

money realized from such sale was paid over to the judgment creditor in satisfaction of its judgments, *pro tanto*, at least; that on October 31, 1899, a petition in involuntary bankruptcy was filed against Peterson in the United States District Court for Montana, and on December 18, 1899, he was adjudged a bankrupt; that on January 2, 1900, the plaintiff (respondent), Greene, was appointed trustee of such bankrupt estate. To this complaint a demurrer was interposed on the ground that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was overruled, and the defendant (appellant) answered. On the trial the defendant objected to the introduction of any evidence on the part of the plaintiff, upon the ground that the complaint does not state facts sufficient to constitute a cause of action. This objection was overruled. The trial court instructed the jury to return a verdict in favor of the plaintiff for the amount of his demand, and from a judgment entered for the amount of the verdict this defendant appeals.

Mr. William G. Downing, for Appellant.

The complaint in this case fails to state a cause of action against the defendant, and the court ought not to have overruled the demurrer to the complaint.

"To entitle an assignee in bankruptcy to successfully attack a preference given to the creditor, as being in fraud of the bankruptcy law, he must bring himself entirely within the statutory provisions." (*Annibal Assignee, etc. v. Heacock*, 2d Federal, page 169; *In re Eggert*, 98 Fed. 843.)

"The burden of showing that a creditor of the bankrupt has acquired an illegal preference, is upon the assignee seeking to avail himself of that fact. He must show, by a fair preponderance of proof, that the debtor was insolvent, or in contemplation of insolvency; that the security was designed to give a preference, and that the creditor had a reasonable cause to believe the insolvency and knew the security was designed to give a preference." (*Crain v. Penny*, 2d Fed. page 18; *Black on Bank-*

ruptcy, 1898, page 189, and cases cited; *In re Nelson*, 98 Fed. page 76; *Samuel V. Mays et al. v. Frederick A. Fritton*, 20th Wallace, 414-420; *Clarke v. Iselin*, 21st Wallace, page 360-378; *In re Blair*, 4 Am. Bankruptcy Repts. 220; Collier on Bankruptcy, 3d Ed., 346-347; *Levor v. Seiter*, 8 Am. Bankruptcy Repts. 459; see, also, 102 Fed. 987.)

Mr. George H. Stanton, for Respondent.

The first error assigned is that the court committed error in overruling the appellant's demurrer to the complaint. This demurrer was based upon the alleged ground that the complaint failed to state facts sufficient to constitute a cause of action. The complaint sets forth concisely all the facts out of which this controversy has grown, and any other allegations in the complaint would have been surplusage. Perhaps the easiest way to answer the appellant's contention respecting the alleged error committed in overruling the demurrer is to quote the language of the learned district judge found in his memorandum at the foot of the order overruling the demurrer, which memorandum is as follows: "The foregoing order is based upon the provisions of Section 67 of the Bankruptcy Act, and Subdivision F of said section, which provides, among other things, that all judgments obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of a petition in bankruptcy against him shall be deemed null and void in case he is adjudged a bankrupt. In the case at bar the judgment was recovered within four months prior to the judgment debtor being adjudged a bankrupt. Under the provisions of said subdivision of said section, the judgment is declared to be a nullity. This section has been held to be in full force in the case *In re Richards*, reported in 96 Fed. Rep. 935; *In re Vaughan*, 97 Fed. Rep. 560; *In re Higgins*, 97 Fed. Rep. 775. By Section 70 of the Bankruptcy Act the trustee is vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt with all the powers which the bank-

rupt might have exercised for his own benefit. The judgment of the defendant against the bankrupt Peterson by operation of law being a nullity, the trustee under the foregoing provisions would have full power to recover the proceeds arising from the enforcement of such void judgment. This seems to be the construction of the Bankruptcy Act touching the question involved in this case by the federal courts. *In re Kenney*, 97 Fed. Rep. 557, the court says: 'This provision (referring to Subdivision F of Section 67) shows incontestably that no preference can be acquired by levy and sale within four months of filing the petition in bankruptcy; but that though the *bona fide* purchaser at the sale will be protected, the proceeds must stand in lieu of the property sold, and that the judgment creditor's right under such levy will pass to the trustee in bankruptcy.' The same conclusion substantially is reached in *In re Hammond*, 98 Fed. Rep. at top of page 863; see, also, *In re Franks*, 96 Fed. Rep. 635; *In re Felle Rath*, 95 Fed. Rep. 121."

MR. JUSTICE HOLLOWAY, after making the foregoing statement, delivered the opinion of the court.

The plaintiff must recover, if at all, by virtue of Section 60b or Section 67f of the Bankruptcy Act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 562, 565 [U. S. Comp. St. 1901, pp. 3445, 3450]); and the complaint must be tested by the provisions of those sections, which are as follows:

"Sec. 60b. If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person.

"Sec. 67f. That all levies, judgments, attachments, or other liens, obtained through legal proceedings, against a person who is insolvent, at any time within four months prior to the filing

of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt.

* * *

Under the terms of Section 60b, above, not every preference is voidable at the election of the trustee, but only such as shall have been given within four months before the filing of the petition in bankruptcy, or after its filing and before adjudication, and wherein the person receiving the preference, or to be benefited thereby, shall have had reasonable cause to believe that it was intended to give such preference. In order, then, that the trustee shall prevail, he must show, first, that the preference was given within four months before the filing of the petition; and, second, that the Montana Brewing Company had reasonable cause to believe that Peterson, in suffering judgments to be recovered against him in August, 1899, intended thereby to give appellant a preference, within the meaning of the Bankruptcy Act; and the burden of proof is upon the trustee to sustain both of these propositions. (*Levor v. Seiter*, 8 Am. Bankr. R. 459, 74 N. Y. Supp. 499.) If these facts must be proved in order to entitle the trustee to recover, the facts must be alleged in his complaint, in order to admit the proof; and, in the absence of the allegation that the Montana Brewing Company had reasonable cause to believe a preference was intended, the complaint fails to state a cause of action under Section 60b.

Section 67f provides that certain liens including judgment liens obtained through legal proceedings against an insolvent within four months prior to the filing of the petition in bankruptcy, shall, in case he is adjudged a bankrupt, be void, and the property affected shall be discharged from the same, and shall pass to the trustee for the benefit of the bankrupt estate. It is not the judgment which becomes void, but the lien of the judgment becomes ineffective to longer hold the property, and it passes to the trustee. Such

is the manifest meaning of the section, when considered as a whole. In fact, the subject-matter of the section is *liens*, not *judgments*. (*In re Pease*, 4 Am. Bankr. R. 547.)

The complaint alleges that prior to the filing of the petition in bankruptcy the property of Peterson had been sold under execution, had gone into the hands of innocent third parties, and the money had been paid to the judgment creditor in satisfaction of its judgments. When the petition in bankruptcy was filed, then, there was no property of the bankrupt estate subject to a judgment lien which could be released from the same, or which could pass to the trustee for the benefit of the bankrupt estate. The judgment had been satisfied, and the matter entirely closed, before any bankruptcy proceedings were initiated, and the provisions of Section 67f therefore have no application whatever to the facts of this case. In *Levor v. Seiter*, above, the same state of facts was presented as in the case at bar; and the Supreme Court of New York held that the trustee could not recover under Section 60b, for failure to prove that the judgment creditor of the bankrupt had reasonable cause to believe that the bankrupt, by suffering judgment to be taken against him, intended thereby to give a preference, and further held that, as the money had been paid over to the judgment creditor before the bankruptcy proceedings were instituted, the provisions of Section 67f did not apply.

There is nothing in the views herein expressed which conflicts with the decisions in *In re Kenney* (D. C.), 95 Fed. 427, or *In re Blair* (D. C.), 102 Fed. 987.

We have, therefore, a case which does not fall within the provisions of Section 67f, and a complaint which does not state facts sufficient to constitute a cause of action under the provisions of Section 60b.

A motion to dismiss this appeal has been interposed upon the ground that the appellant has violated Rule VII of the rules of this court in incorporating in the transcript the formal parts of the pleadings, writs, and other papers, when no question arises in respect to the same, and in incorporating in the tran-

script exhibits used in the trial court, when no question of any character is predicated upon them. There are other grounds of the motion which it is not necessary to consider. In so far as Subdivision 5 of Rule VII has been violated by incorporating in the transcript mere formal parts of papers, the appellant will not be permitted to recover as part of his costs the expense of printing that portion of the transcript thus encumbered. At least one-third of the expense of printing the transcript was unnecessarily incurred. The motion to dismiss the appeal is denied.

The judgment is reversed. The appellant will recover only two-thirds the expense of printing the transcript in this case, together with such other costs as by law he is entitled to recover.

Rehearing denied, July 14, 1903.

BULLARD, APPELLANT, v. SMITH, RESPONDENT.

(No. 1,588.)

(Submitted May 27, 1903. Decided June 10, 1903.)

28 387
32 467
32 468

Promissory Notes—Negotiability — Provisions for Attorney's Fees—Amendment of Statute Affecting Negotiability—Constitutionality — Retroactive Operation — Consideration — Duress — Burden of Proof — Evidence — Witnesses — Impeachment—Instructions.

1. Laws of 1899, page 115, amending Section 3906, Civil Code, so as to permit a negotiable instrument to contain a provision for reasonable attorney fee, was prospective in its operation only, and did not make negotiable a note, given before its passage, which was non-negotiable by reason of its containing a provision for attorney's fees.
2. The circumstances under which a contract is made, or the intent of the parties existing at the time, are only material when the contract is ambiguous in some of its terms.
3. A party cannot impeach an opposing witness by introducing evidence contradictory of testimony elicited from him for the first time on cross-examination.

4. Where, on asking a question, counsel, in response to a query by the court, stated the purpose of the testimony sought to be brought out, he was precluded from thereafter claiming a different purpose.
5. Alleged error in failing to require a witness to answer a question, which he refused to answer on the ground that it involved a privileged communication from a client, was not cause for reversal, where the evidence sought to be elicited was inadmissible, though no objection was made at the time.
6. Where plaintiff believed that certain property had been stolen from him, and that defendant was connected with the theft, and the latter gave a note to plaintiff for the damages occasioned by the theft, there was a sufficient consideration for the note.
7. Evidence considered, and held insufficient to sustain a jury finding that the note sued on was executed under duress.
8. The giving of an instruction having no foundation in the evidence is error.
9. When a suit is brought by an indorsee or assignee of a non-negotiable note, the burden of proof is upon him to show that the note was originally issued upon valuable consideration, and that he is a *bona fide* holder thereof, but the burden does not also rest upon him to show that no other defense exists to the note.
10. In an action on a note, the burden of proving duress is on defendant.

Appeal from District Court, Custer County; C. H. Loud, Judge.

ACTION by W. H. Bullard against H. A. Smith. From a judgment for defendant, and from an order denying a new trial, plaintiff appeals. Reversed.

Mr. Sydney Sanner, and Mr. T. J. Porter, for Appellant.

The note in suit is negotiable, because the Act of 1899, amending Section 3996, Civil Code, is remedial, to be liberally construed, and is properly applicable to the note in suit. (Black on Interpretation of Laws, pp. 261-263, 307-312; *Ins. Co. v. Talbot*, 3 Am. St. Rep. 655; *Bank v. Fuqua*, 11 Mont. 282; *Wilson S. M. Co. v. Moreno*, 7 Fed. 806; *Salisbury v. Stewart*, 62 Am. St. Rep. 934; *Williams v. Flowers*, 24 Am. St. Rep. 772; *Montgomery v. Crossthwaite*, 24 Am. St. Rep. 832; *Shenandoah Bank v. Marsh*, 48 Am. St. Rep. 381; *Sperry v. Horr*, 32 Iowa, 104; *Carriere v. Minturn*, 5 Cal. 435; *Monroe v. Fohl*, 72 Cal. 571; *White v. Allatt*, 87 Cal. 248; *Barton v. Farmers' Bank*, 122 Ill. 352; *Bank of British North America v. Ellis*, 2 Fed. Rep. 48; *Bank of Colfax v. Anglin*, 33 Pac. 1056; *Seaton v. Scovill*, 26 Am. Rep. 779; 1 Daniel, Neg. Inst. (3d

Ed.), p. 70; Black, Interpretation of Laws, pp. 252, 254, 261-3, 265-7; Sutherland, Stat. Const. Secs. 206, 207, 408, 409, 482; *U. P. Ry. Co. v. De Busk*, 13 Am. St. Rep. 221; *Lane v. White*, 21 Atl. 437; *Judkins v. Taffe*, 27 Pac. 221; *Dobbins v. Bank*, 112 Ill. 553; *Jackson v. Warren*, 32 Ill. 339; *Smith v. Stevens*, 82 Ill. 554; *Hudler v. Golden*, 36 N. Y. 446; *People v. Spicer*, 99 N. Y. 225; *Cullerton v. Mead*, 22 Cal. 98; *Quackenbosh v. Reed*, 102 Cal. 494; *Fisher v. Hervey*, 6 Colo. 16.)

The Act of March 3, 1899, is entitled to be judged by the general rules of construction independent of Section 4651 of the Civil Code. An act of the legislature cannot control the acts or subsequent legislatures, nor bind them, nor prevail over their intention. (1 Cooley's Blackstone, 90; *In re Madeira Irrig. Dist.*, 92 Cal. 296.) Nor can it be logically contended that this conclusion is obnoxious to the principle of the integrity of contracts or that it violates any vested rights. No man has a vested right in a rule of procedure; legislatures may change the proceedings of courts to suit their convenience, and unless such change acts as an absolute denial of all rights it is not open to complaint. (Sutherland, Statutory Construction, Sec. 483, *et cit.*) The following cases are analogous to the case at bar and are decisive of this question, in our opinion: *Tompkins v. Forestal*, 55 N. W. 813 (Minn.); *Jackson v. Lamphire*, 3 Peters, 280; *Satterlee v. Matthewson*, 2 Peters, 406; *Sampeyreac v. U. S.*, 7 Peters, 220; *Ewell v. Daggs*, 108 U. S. 150; *Gross v. U. S. Mortgage Co.*, 108 U. S. 488; *Mason v. Haile*, 12 Wheaton, 370; *Drehman v. Stifel*, 8 Wall. 595, affirming 97 Am. Dec. 268; *Insurance Co. v. Talbot*, 3 Am. St. Rep. 655; *Gage v. Stewart*, 11 Am. St. Rep. 116; *Wistar v. Foster*, 24 Am. St. Rep. 241; *Summers v. Mitchell*, 30 Am. St. Rep. 106; *Shields v. Clifton, Hill Land Co.*, 45 Am. St. Rep. 704; *Donley v. Pittsburgh*, 30 Am. St. Rep. 738; *Whitney v. Pittsburgh*, 30 Am. St. Rep. 740; *Bellevue v. Peacock*, 25 Am. St. Rep. 55; *Richman v. Muscatine Co.*, 14 Am. St. Rep. 308; *Judkins v. Taffe*, 27 Pac. 221; *Oullahan v. Sweeney*, 79 Cal. 537; *Gordon v. San Diego*, 101 Cal. 522; *Dunne v. Mastick*, 50 Cal.

244; *Cummings v. Howard*, 63 Cal. 503; *Dentzel v. Waldie*, 30 Cal. 139; *Wood v. Westborough*, 140 Mass. 403; *Simmons v. Hanover*, 23 Pick. 192-3; *Kempton v. Saunders*, 130 Mass. 236; *Lyman v. B. & W. R. R. Co.*, 4 Cushing, 288; *Tate v. Stoolzfoos*, 16 Am. Dec. 546; *Duanesburgh v. Jenkins*, 57 N. Y. 191; *People v. Supervisors*, 70 N. Y. 233; *Van Rensselaer v. Snyder*, 13 N. Y. 299; *Morse v. Gould*, 1 Kernan (N. Y.), 281; *Stocking v. Hunt*, 3 Denio (N. Y.), 274; *Conkey v. Hart*, 14 N. Y. 22. See, also, Civil Code, Secs. 4240, 2204, 4604; *Manderville v. Bank*, 9 Cranch, 9; 1 Daniel's Negotiable Instruments (3d Ed.), Secs. 106-107; 1 Randolph on Commercial Paper, Sec. 177.

Statements made by a client to his attorney in the presence of third parties, or to third parties in the presence of his attorney, are not privileged because they have by the act of the client been given publicity. (*Satterlee v. Bliss*, 35 Cal. 507; *Chirac v. Reinicker*, 11 Wheat. 280; 1 Greenleaf on Evidence, Sec. 245; 3 Jones on Evidence, Sec. 770 and note 14; 3 Jones on Evidence, Sec. 774; Weeks on Attorneys, Sec. 151, pp. 280-282; Weeks on Attorneys, Sec. 159, p. 289; Note to 15 Am. St. Rep. 818 *et cit.*; *Micheal v. Foil*, 6 Am. St. Rep. 577; *Goodwin Gas Co. Appeal*, 1 Am. St. Rep. 696; *House v. House*, 1 Am. St. Rep. 570; *Cady v. Walker*, 4 Am. St. Rep. 834.)

The court having sustained an objection to the competency of the witness based upon his supposed professional relationship with the defendant, it became of no moment what were the terms of the offer of proof, or whether any offer was made. It will be presumed under these circumstances that the testimony was material, competent and relevant to the issue. (*McGinniss v. State*, 31 Pac. 978; *Owens v. Frank*, 53 Pac. 282.)

The instruction of the court upon the question of the consideration of the note was erroneous. (*Beath v. Chapoton*, 115 Mich. 506; *Thorn v. Pinkham*, 84 Maine, 101; *Mascolo v. Montesanto*, 29 Am. St. Rep. 170.)

Mere threats, to which no one pays serious attention, which put no one in fear, which arouse no just apprehension, are not

sufficient to avoid a contract. (*Barrett v. Mahnken*, 71 Am. St. Rep. 953; 6 Am. & Eng. Ency. Law (1st Ed.), p. 64 *et cit.*; *Adams v. Stringer*, 78 Ind. 175.)

If there be no reason for the prosecution, one threatened unjustly has his remedy at law, and if there be reason for the prosecution, then the threat of such is not a threat of unlawful imprisonment, and the holding out to one of the alternative of prosecution or fair dealing does not constitute duress and will not avoid a contract. (*Beath v. Chapoton*, 115 Mich. 506 *et cit.*; *Wolff v. Bluhm*, 60 Am. St. Rep. 115; *Thorn v. Pinkham*, 84 Maine, 101; *Mascolo v. Montesanto*, 29 Am. St. Rep. 170; 6 Am. & Eng. Ency. Law (1st Ed.), pp. 62, 69, 70 *et cit.*; *Town Council v. Burnett*, 34 Ala. 400; *Knapp v. Hyde*, 60 Barb. (N. Y.), 80; *Buchanan v. Sahlein*, 9 Mo. App. 533; *Compton v. Bunker Hill Bank*, 96 Ill. 301.)

Mr. George W. Myers, for Respondent.

An interpretation that would construe the Act of March 3, 1899, to be remedial would also have to hold that said Act was retroactive, which would be in violation of the mandatory and prohibitive language of the constitution. (Constitution of Montana, Art. III, Sec. 11; *Robinson v. Magee*, 9 Cal. 81; *People v. Bond*, 10 Cal. 162, 572; *Garland v. Lewis*, 26 Cal. 46; *People v. Senter*, 28 Cal. 506. See notes under Sec. 10, Art. I, Constitution U. S.; *Dewey v. Lambier*, 7 Cal. 347; *Cohen v. Davis*, 20 Cal. 195; *Billings v. Hall*, 7 Cal. 1; *Touleume Redemption Co. v. Sedgewick*, 15 Cal. 515; *Hibernia S. & L. Soc. v. Hayes*, 56 Cal. 303; *Pignaz v. Burnett*, 119 Cal. 157.)

The note in suit is a non-negotiable note, made so by the provisions of the Civil Code which were in force at the time the note was made. (Civil Code, Secs. 3991, 3992, 3994, 3996, 3997; *Adams v. Semans*, 82 Cal. 636; *Stadler et al. v. First National Bank of Helena*, 22 Mont. 190; *Bank v. Babcock*, 94 Cal. 96; *Bank v. Basuier*, 12 C. C. A. 517, 65 Fed. 58.)

When a legislature borrows a statute from another state, the legislature will ordinarily be presumed to have adopted the statute with the interpretation theretofore given it by the courts of that state. (*Stadler v. First Nat'l Bank*, 22 Mont. 190; *First Nat'l Bank v. Bell S. & C. Min. Co.*, 8 Mont. 32; *Territory v. Sears*, 2 Mont. 324; *Stackpole v. Hallahan*, 16 Mont. 40; *State v. O'Brien*, 18 Mont. 1, 43 Pac. 1091; *Murray v. Heinze*, 17 Mont. 353, 42 Pac. 1057, and 43 Pac. 714; *State v. Butte City Water Co.*, 18 Mont. 199; *Largey v. Chapman*, 18 Mont. 563.)

An attorney cannot without the consent of his client be required to answer any questions respecting communications made by his client to him, or upon advice given by the attorney to his client in the course of professional employment. (Code of Civil Procedure, Sec. 3163, Subd. 3; 1 Greenl. Ev. (13th Ed.), Sec. 240 and cases there cited, also Sec. 243; *Gray v. Fox*, 97 Am. Dec. 416; Jones on Law of Ev. Secs. 766, 767, and cases cited; *Detrich v. Mitchell*, 92 Am. Dec. 101; *Bank of Utica v. Mersereau*, 49 Am. Dec. 221.)

A witness cannot be impeached as to collateral or immaterial matter brought out on cross-examination. (*Denver Tramway Co. v. Owens*, 36 Pac. 853; *Mullen v. McKim*, 45 Pac. 417; 1 Greenl. Sec. 462 *et seq.*; *Jordan v. McKinney*, 144 Mass. 438; *Farnum v. Farnum*, 13 Gray, 508; *Kaler v. Builders' Ins. Co.*, 120 Mass. 333; *Trambling v. Cal. Nav. etc. Co.*, 121 Cal. 144; *Barkley v. Copeland*, 86 Cal. 488; *People v. Dye*, 75 Cal. 112.)

To sustain an exception to the rejection of evidence counsel should make his offer in such plain and unequivocal terms as to leave no room for doubt as to what is intended. If he leaves the offer fairly open to two constructions, he cannot insist in a court of review on the construction most favorable to himself, unless it is justly inferable that he was so understood by the judge who rejected the evidence. (*Palmer v. McMaster*, 10 Mont. 398; *Chamberlain v. Vance*, 51 Cal. 75; *Smith v. East Branch Co.*, 54 Cal. 164; *Schroder v. Smith*, 74 Cal. 459.)

If our theory of the case is correct and the note in suit is a non-negotiable note, then it is not only incumbent upon appellant to show by a preponderance of the evidence that the note in suit was made by defendant Smith to Donaldson, for a good and valuable consideration, but also to establish by a preponderance of the evidence, all the propositions upon which his case rests. (Bradner on Ev. Sec. 4, p. 343; *Wilder v. Cowles*, 100 Mass. 487; *Rossiter v. Loeber*, 18 Mont. 372; *Harrington v. B. & M. Co.*, 19 Mont. 411; *Wilder v. Cowles*, 4 Brown, 100 Mass. 487; *Scott v. Wood*, 81 Cal. 398, cited 21 Nev. 349; *Thamling v. Duffey*, 14 Mont. 567; *Vosburgh v. Diefendorf*, 119 N. Y. 357; 2 Greenl. on Ev. Sec. 172; *Munroe v. Cooper*, 5 Pick. 412; *First Nat'l Bank v. Green*, 43 N. Y. 298; *Smith v. Livingston*, 111 Mass. 342.)

To compound a crime is to agree not to prosecute it when the party so agreeing knows it to have been committed. (Penal Code, Sec. 280; 2 Wharton, Crim. Law (8th Ed.), Sec. 1559; 4 Blackstone's Com. 124-136.) Notes given by the maker for the purpose of stifling prosecution by the payee, of a criminal charge made by them against a third person, are invalid and unenforceable. (*Leggatt v. Brown*, 29 Ont. Rep. 530; *Commonwealth v. Pease*, 16 Mass. 91; *Ream v. Sauvian*, 43 Pac. 982; *First Nat'l Bank v. Greeg*, 1 Mo. A. Repr. 293; *Murphy v. Bottomer*, 40 Mo. 67; *Cheltenham F. B. Co. v. Cook*, 44 Mo. 29; *Owen v. Green*, 45 S. W. 84; *McCormick Harvesting Co. v. Miller*, 74 N. W. 1061; *Sylvester-Bleckley Co. v. Goodwin*, S. E. Rep. 3.)

It is not incumbent upon defendant to establish by a preponderance of all the evidence that he was actually put in fear of prosecution for grand larceny or of death or of bodily harm, but it is upon the plaintiff to make out his case by a preponderance of the evidence and to entirely overcome the presumptions from the evidence produced by defendant. (*Rossiter v. Loeber*, 18 Mont. 372; *Vosburgh v. Diefendorf*, 119 N. Y.

Where the evidence is conflicting, an order denying a new trial will not be reversed on the ground that the evidence does not justify the verdict. (*Beckstead v. M. U. Ry. Co.*, 19 Mont. 147; *Harrington v. B. & B. M. Co.*, 19 Mont. 411; *Crystal Lake Ice Co. v. McAulay*, 75 Cal. 631; *Reardon v. Patterson*, 19 Mont. 231; *Ray v. Cowan*, 18 Mont. 259; *McIntyre v. McCabe*, 19 Mont. 333; *Antoine Co. v. Ridge Co.*, 23 Cal. 219; *Matthai v. Matthai*, 49 Cal. 90; *Kinna v. Horn*, 1 Mont. 598; *Barry v. Coughlin*, 90 Cal. 220; *Crosset v. Whelan*, 44 Cal. 200; *Heinlen v. Heilburn*, 97 Cal. 101; *Reary v. Butler*, 95 Cal. 206; *Wilson v. Fitch*, 41 Cal. 363; *Johnson v. Brown*, 115 Cal. 694.)

MR. COMMISSIONER CLAYBERG prepared the opinion for the court.

Action on promissory note dated November 29, 1898, for \$1,000, made, executed and delivered by respondent to one James Donaldson, and transferred to appellant for a valuable consideration before maturity. The note in question was in the following form: "Miles City, Montana, Nov. 29, 1898. \$1,000.00. Sixty days, without grace after date I promise to pay to the order of James Donaldson, one thousand dollars, at the First National Bank of Miles City, with interest at ten (10) per cent. per annum from and after M. until paid, for value received with attorney's fees in addition to other costs in case the holder is obliged to enforce payment at law. H. A. Smith. The State National Bank. No. 13,282. [Five revenue stamps—a one, two two's, one five, one ten.]" Indorsed on face: "Protested this 28th day of January, 1899, for nonpayment. Jno. E. De Carle, Notary Public." Indorsed on back: "Pay to W. H. Bullard. James Donaldson. Pay State National Bank or order. W. H. Bullard."

The complaint contained the ordinary allegations in a suit on a promissory note. The answer, after certain denials of allegations of plaintiff's complaint, alleged affirmatively that

Donaldson, by duress, force, and threats, compelled the execution of the note; that it was without consideration, and that Donaldson knew that fact; that plaintiff knew that the note was void at the time of its purchase; and that he was not a *bona fide* holder. The replication denied all these affirmative allegations, and alleged that the note was executed voluntarily in part settlement of an existing indebtedness. Upon a trial of the issues thus raised, a great amount of testimony was introduced, all of which is set forth in the transcript. Plaintiff made a *prima facie* case on the trial by the introduction of the note, proof of a purchase before maturity, and proof of the reasonable value of the attorney's fees provided for in the note, and then rested. Defendant was sworn as a witness in his own behalf, and testified to facts which his counsel insists show that the note was given under duress, and then rested. Plaintiff then introduced testimony tending to show that he purchased the note prior to maturity for \$900 cash, and that the note was given Donaldson voluntarily, and in consideration of damages he had suffered because of the theft of certain of his sheep, with which it was insisted defendant was connected.

1. The first question to be considered by this court is whether the note sued upon was negotiable. The court below held it to be nonnegotiable, and it followed from such holding that the defendant was entitled to make proof of each and every defense which he might have asserted, had the suit been brought by Donaldson, the original payee of the note. If the note was negotiable, and it appeared that plaintiff obtained it prior to maturity, for a valuable consideration, and without notice of the defenses which the defendant might have interposed against the original payee, he was entitled to recover.

Prior to the passage of the Code of 1895, notes of this character were negotiable. (*Bank of Commerce v. Fuqua*, 11 Mont. 285, 28 Pac. 291, 14 L. R. A. 588, 28 Am. St. Rep. 461.) By Sections 3991 to 3997, Civil Code, they were made nonnegotiable. Section 3992 provides: "A negotiable instrument must be made payable in money only, and without any condition not

certain of fulfillment." Section 3997 provides: "A negotiable instrument must not contain any other contract than such as is specified in this article." Section 3996 provides: "A negotiable instrument may contain a pledge of collateral security, with authority to dispose thereof." By virtue of these provisions of the statute, the supreme court held in the case of *Stadler v. First National Bank of Helena*, 22 Mont. 190, 56 Pac. 111, 74 Am. St. Rep. 582, that no instrument was negotiable which contained a contract to pay attorney's fees, because of Section 3997, and because a contract of that character is not mentioned in the statute. By the statute of 1895, making such notes non-negotiable, the legislature provided, in effect, that the maker of a note might plead defenses of the character asserted here in a suit brought by an indorsee or assignee of the note. Thus the statute of 1895 created a defense which the maker might for the first time in this state plead in a suit brought upon a note similar to the one in question by an indorsee or holder thereof. There is no doubt but that the legislature had power to pass this Act, and that it was constitutional in every regard.

The decision of *Stadler v. Bank*, *supra*, was rendered on February 20, 1899. The legislature of Montana was then in session, and passed an Act amending Section 3996 so as to read as follows: "A negotiable instrument may contain a pledge of collateral security with authority to dispose thereof, also a provision for reasonable attorney fee or both." By Section 2 of the same Act, the legislature further provided, "All Acts and parts of Acts inconsistent herewith are hereby repealed." (Laws of 1899, p. 124.) By this action of the legislature, notes which under the statute of 1895, as construed by this court in *Stadler v. Bank*, *supra*, were nonnegotiable, were made negotiable. In effect, the legislature took away from the maker of a note a defense which he was allowed to assert only by virtue of the provision of the Code of 1895.

There is no prohibition in our constitution against retrospective legislation, other than that which is stated in Section 11, Article III, which is as follows: "No *ex post facto* law, nor

law impairing the obligation of contracts, or making any irrevocable grant of special privileges, franchises or immunities shall be passed by the legislative assembly." It follows that the legislature was therefore untrammelled and free, in so far as constitutional provisions were concerned, to pass any retrospective laws which did not violate the obligations of contracts or interfere with any vested rights.

While there is no constitutional provision against retrospective legislation, the Civil Code of 1895, in which the sections above quoted are found, contains these provisions:

"Sec. 4650. This Code takes effect at twelve o'clock noon on the first day of July, 1895.

"Sec. 4651. No part of it is retroactive unless expressly so declared."

We find similar provisions in the Political Code and Code of Civil Procedure, passed at the same time.

We are therefore called upon to construe the amendment to Section 3996, passed by the legislature of 1899, in connection with Section 4651, Code of 1895. By the last-mentioned section the power of the legislature to enact retroactive or retrospective laws is recognized, but a limitation is placed upon the exercise of such power, by requiring that, in case of the passage of such Acts, they must be expressly declared to be retroactive in their operation. We do not find in the amendment of 1899 any express declaration mentioned in Section 4651, that the Act should be retroactive in its operation. A general rule of construction of statutes is that the meaning and intent of the legislature must be arrived at and enforced. (*United States v. Hartwell*, 6 Wall. 385, 18 L. Ed. 830.) In order to arrive at this legislative intent, we must investigate the history of the passage of the Act of 1899. Upon examination of the original bill on file in the office of the secretary of state, we find the following facts:

On January 23, 1899, this Act was introduced in the senate as Senate Bill No. 36, in the following form:

"A Bill for an Act to amend Section 3996, Title XV, Chapter 1, Article 1, of the Civil Code of the State of Montana, relating to negotiable instruments.

"Be it enacted by the Legislative Assembly of the State of Montana:

"Section 1. That Section 3996, Title XV, Chapter 1, Article I, of the Civil Code of the State of Montana, be amended so as to read as follows: Section 3996. A negotiable instrument may contain a pledge of collateral security with the authority to dispose thereof, also a provision for reasonable attorney fee, or both."

On February 6th it was considered by the committee of the whole, and amended as follows: "After the word both 'and the negotiability of all promissory notes and instruments outstanding, and the terms and conditions thereof unfulfilled, at the time this Act takes effect shall be determined and governed by the provisions hereof. Section 2. All Acts and parts of Acts inconsistent herewith are hereby repealed.'"

On February 7th it was passed as amended. It was then referred to the house, where the following action was taken: On February 16th it was reported back by the judiciary committee with an amendment striking out the words "and the negotiability of all promissory notes and instruments outstanding and the terms and conditions thereof unfulfilled at the time this Act takes effect shall be determined and governed by the provisions hereof." On February 24th it was passed by the house as amended therein. It was then transmitted to the senate. February 27th, in the senate, the house amendments were concurred in, and the bill was passed and signed.

It thus conclusively appears from the legislative history of the Act of 1899 that the legislative intent was to make the Act prospective in its operation only. Section 4651 not only applies to the Code of which it is a part, but to all amendments to such Code thereafter made. (*Central Pac. R. R. Co. v. Shackleford*, 63 Cal. 261; *Teralta Land and Water Co. v. Shaffer*, 116 Cal. 518, 48 Pac. 613, 58 Am. St. Rep. 194; *Dodge v. Nevada Na-*

tional Bank, 109 Fed. 726, 48 C. C. A. 626; *Ely v. Holton*, 15 N. Y. 595.)

The point urged by counsel for appellant, that one legislature cannot limit the power of a subsequent legislature, is not material to this case. The only limitation claimed is based upon the provisions of Section 4651. It is apparent from an examination of this section that it does not seek or purport to limit the power of future legislatures to pass retroactive laws, but merely provides a condition which must be conformed to when by the passage of such Acts it is intended to render them retroactive in operation.

We therefore conclude that the note was nonnegotiable, and was not made negotiable by the Act of 1899.

This conclusion renders it unnecessary to consider the question whether or not, if the legislature had intended to make the Act of 1899 retroactive in its operation, it would have been open to the objection that it impairs the operation of contracts.

Counsel for appellant claim that the note was rendered negotiable under the provisions of Sections 2204, 4240, and 4604 of the Civil Code. We do not find anything in either of these sections, nor in the chapter of the Code upon the interpretation of contracts, which is referred to in Section 4240, which authorizes us to hold that the note in question is negotiable. The language of the note is plain and unambiguous, and seems to express clearly the intention of the parties when it was made. It is a well-settled rule of law that the circumstances under which a contract is made, or the intent of the parties existing at that time, are only material when the contract is ambiguous in some of its terms. If it is plain and unambiguous, it needs no construction, and it is the duty of the court to enforce the contract as made by the parties. It is not alleged or claimed in any of the pleadings that the intention of the parties to the note was not fully and fairly expressed therein, or that the defendant waived, or intended to waive, any benefit conferred by law upon him.

2. It is next claimed that the court erred in not requiring witness Geo. R. Milburn to answer the following question: "Whose attorney were you at that time?" The witness declined to answer the question because to do so might violate his obligation as an attorney. Thereupon counsel for appellant made an offer in writing of what he proposed to prove by the witness, which was in the following language: "Plaintiff offers to prove by this witness, Milburn, that he was the attorney of H. A. Smith, the defendant herein, at the time of the trial of the case of the State against Broadbent, and that he was not discharged as such attorney for said Smith either on October 25, 1898, or on November 25, 1898, or before the trial of the said State against Broadbent, or at all. This evidence is offered in contradiction of the testimony of said defendant, Smith." After the offer had been made, the court asked: "Is there any objection to the offer?" To which counsel for the defendant replied: "We haven't any particular objection, so far as we are concerned, to the offer." This offer was then shown to the witness, and the court propounded to him the following question: "What do you say to the court now? Do you feel that, by giving testimony in conformity with the offer which you have read, it would violate your obligation as an attorney?" To which the witness answered: "I would say this, if your honor please: Without the express personal consent of Mr. Smith for me to give what may be legal and proper evidence in response to that offer, I shall decline to do so." Whereupon the court said: "The court will not compel you to do so, then."

Counsel for appellant only argues the alleged error of the court in not requiring the witness to answer the question, and makes no reference to the ruling of the court upon the offer. There is no doubt but the question asked was objectionable upon the ground that it sought to contradict the defendant as to his statements made while on the witness stand. This is conclusively shown by the reply of appellant's counsel to the question of the court, viz., "What is the object of the testimony?" "The object of the testimony is this: Smith testified upon the stand

that Judge Milburn had been his attorney; that he had hired him somewhere about the 16th or 20th of October; that he had discharged him on the 25th of October. This question is preliminary, for the purpose and simply by way of contradiction of Mr. Smith." A reference to the record discloses that the testimony of defendant which it was sought to thus contradict was brought out on cross-examination by plaintiff's counsel. No reference is made to any question of the employment of an attorney by defendant in his direct examination. So that this cross-examination was clearly upon a collateral matter. The rule is well settled that a witness cannot be contradicted as to collateral matters brought out upon cross-examination. (Greenleaf on Evidence, Sec. 462 *et seq.*)

Counsel say that the question was "preliminary, for the purpose and simply by way of contradiction of Mr. Smith." True, such purpose was apparent, but the question was in no sense preliminary to such purpose. If the witness had answered the question by saying that he was Mr. Smith's attorney at that time, this would have been a direct contradiction of Smith's testimony, and, as such, would have been inadmissible. Counsel for appellant, in his argument, very ingeniously maintains that this question was merely preliminary to a purpose to adduce testimony from the witness tending "to show that Smith had in the presence of Judge Milburn, at various times, admitted his complicity in the larceny to Donaldson, and had made repeated offers of settlement." Such purpose was not disclosed in the offer of testimony made, and the law does not permit counsel to thus play "fast and loose." He offered to prove by the witness certain facts. By this offer he confined such facts to the contradiction of the testimony of defendant. He cannot now be allowed to enlarge or extend the scope of such offer beyond the limits then placed upon it. But even if he could, such testimony would have been absolutely inadmissible, because no foundation was laid by the original examination of defendant. We are therefore of the opinion that if error was committed by the court in this regard, which we do not decide, it was not reversible error.

3. Did the evidence disclose a sufficient consideration for the note in question? The burden of proof was upon the plaintiff in the suit to show by a preponderance of the evidence that the note was given by respondent to Donaldson upon a good and valuable consideration. This consideration was claimed by Donaldson to rest upon the following facts, viz.: In the latter part of September, 1898, some horses and a large number of sheep were stolen from him. He claims that among the sheep stolen were a large number of ewes, with their lambs; that, upon making a search for these ewes and lambs, he found a portion of the ewes at a point some thirty-five miles distant from his ranch, from which they had been stolen; that he was told by respondent, who aided in the search, that the lambs were on his ranch with a band of sheep, and that they were turned over to him, as he supposed, as his share of lambs from a band of sheep belonging to him or his wife, which one Broadbent was running on shares. Donaldson proceeded to respondent's ranch, and 560 of these lambs were turned over to him. He claims that he did not receive back the entire number of sheep and lambs which had been stolen from him. He then caused the arrest of Broadbent and two other men, by the names of Beatty and Hand. It seems that Beatty, while confined upon this arrest, confessed to the theft of the sheep and lambs, and implicated respondent in such theft. Immediately upon the discovery of this, Donaldson saw respondent, and told him of Beatty's disclosure, and accused him of complicity. Whereupon, according to the testimony of Donaldson, respondent wanted to settle with him, and they concluded a tentative arrangement, which is denied by respondent. Broadbent was tried at Glendive the latter part of November, 1898. Donaldson, becoming satisfied during the trial that Broadbent would probably be acquitted, demanded of respondent a settlement of his damages caused by the theft. Upon this settlement, respondent gave Donaldson the note in question, together with others. As to the circumstances of this settlement, Donaldson's testimony and that of respondent is entirely irreconcilable, but of this we shall speak later.

In regard to the consideration of this note and the others, it is sufficient to say that from the evidence it conclusively appears that certain sheep had been stolen from Donaldson; that he believed respondent was connected in some way with this theft, and was therefore liable for the damages occasioned thereby; that he took the note in question, in part settlement of these damages, from respondent. Under these facts, if true, there can be no doubt but that a good and valuable consideration existed for the note.

4. Respondent claims that the notes were given under duress, and therefore are void.

The defense of duress or menace is based upon the proposition that the consent of the party to the contract over whom it was exercised was not free.

Section 2112 of the Civil Code provides:

"An apparent consent is not real or free when obtained through (1) duress; (2) menace; (3) fraud; (4) undue influence; or (5) mistake."

Sections 2114 and 2115 provide as follows:

"Sec. 2114. Duress consists in (1) unlawful confinement of the person of the party, or of the husband or wife of such party, or of an ancestor, descendant, or adopted child of such party, husband or wife; (2) unlawful detention of the property of any such person; or (3) confinement of such person, lawful in form, but fraudulently obtained, or fraudulently made unjustly harassing or oppressive."

"Sec. 2115. Menace consists in a threat (1) of such duress as is specified in subdivisions 1 and 3 of the last section; (2) of unlawful and violent injury to the person or property of any such person, as is specified in the last section; or (3) of injury to the character of any such person."

According to respondent's testimony, on November 29, 1898, while he and Donaldson were at Glendive, attending the trial of Broadbent, as witnesses, Donaldson came to his room and demanded of him a complete settlement of the damages occasioned by the theft of the sheep, as above stated. His evidence

does not disclose that any warrant had been issued against respondent, upon which he might have been arrested for the theft, or complicity therein. Donaldson threatened respondent at that conversation that, if the settlement was not made, he (Donaldson) would cause respondent's arrest. Respondent says: "I didn't suppose, under my own course, I could be arrested. Still, I had nothing to fear, and after he had made three threats of having me arrested, and so on, and I still said I wouldn't do anything of the kind, and ordered him again out of my room, he got up and walked to the door and says, 'I will not leave this room until I get this thing fixed as I want it, and neither will you.'" It thus appears by respondent's own testimony that he had no fear of arrest. He then continues: "And he put his hand down under his vest and he drew a six-shooter up like that; didn't draw it below like that. Under the circumstances, the man was in a passion—he had passion and whiskey mixed together; and I honestly believe that, if I had not made those notes as I did, that he would have attempted to murder me in that room." Again he says, on cross-examination: "Donaldson said that Broadbent was going to get loose, and he wasn't going to get anything out of him, and he was going to make me put it up. He said he was going to make me put up the amount of \$7,000. I asked him what it was for, and he said that he had lost the sheep, and that he had a cinch on me; and I told him the best thing he could do, then, was to go ahead and find out. We argued the point awhile. I don't just remember what was said while we were arguing the question. I know that we talked about the sheep that he said he had lost, and about the condition they were in, and so on. He claimed that he had lost 2,000, and didn't know whether he had lost them out of the one band or the other. Well, after we argued awhile there, he concluded that he would take these lambs of Broadbent's that belonged to me and \$3,000 in cash. He thought he was getting it up pretty steep, I suppose, is what induced him to come down from \$7,000 to \$3,000. He admitted as much, anyway. I said I would give it to him. Well, he goes around there awhile, and

when I told him to go out of the room he said he would go out when he got ready, and he went to the door, and I think he turned the key in it—I am not positive of that—and he pulled out a gun, and said if I didn't make these notes to satisfy him, and fix this thing up so he could get his own, I would never get out of that room. He was standing with his back against the door. I was sitting on the bed. We were probably nine or ten feet apart. He did not point the gun at me. He had it pulled from under the waistband of his pants, and had it in his hand. He made no demonstration with it towards me with the gun, other than that he drew it out. * * * I didn't make the notes at the mouth of the pistol at all. After I consented he stood there and said, 'Will you make these notes now, or not?' and I said that, 'under the circumstances, I believe I will be obliged to,' and he put his gun away then. I don't know what effect this had—his threats—on me physically. They had the effect of getting the notes. I don't think it disturbed me physically very much. I don't know as I was exactly afraid of him, but I believe that he would have executed his threats if I had not complied with them. * * * It did not put me in a tremulous sweat. I am not of a nervous disposition. My nerves were good and steady then. * * * I was not nervous at all at the time I made the notes; had nothing to fear as long as I complied with his request. When I executed them I was not in fear."

In respondent's testimony, which, by the way, was all the testimony given at the trial upon the question of menace or duress, we do not find any denial of his connection with or complicity in the theft, and he bases duress solely upon the fact that Donaldson drew a revolver, and said respondent should not leave the room until the matter was settled; yet he says, "I did not make the notes at the mouth of a pistol at all," and "when I executed them I was not in fear." He places the entire ground of menace upon the threats of Donaldson to have him arrested for the theft of the sheep; yet he nowhere says or even intimates that he claimed or insisted in any manner to Donald-

son that he was not guilty of complicity in or connection with such theft. In this connection it is important to refer to the fact that Donaldson absolutely and unequivocally denies that he ever was in respondent's room at Glendive during the Broadbent trial, except on the night of the 27th of November; that the conversation related by respondent ever occurred; that he had a revolver on his person at that time, or that he ever "pulled it" on respondent. His testimony further discloses that from the time of Beatty's confession, and his detailing the substance thereof to respondent, respondent evinced great anxiety to have the entire matter settled, and importuned him (Donaldson) almost daily for such purpose. He further says that on October 31, 1898, which was subsequent to the confession of Beatty, the respondent gave him in cash, in part settlement of the transaction, \$1,000. He details on cross-examination circumstances of the receipt of this money, as follows: "I got this \$1,000 for damages done, and he asked me for this note in case this should be found out, and he would give me this money. He says, 'If this is found out, they will know that I was in the sheep-stealing.' He says, 'After this thing blows over, I will give you the note. * * *' I had the \$1,000 before he asked that of me. He asked me to do it, and I signed it. I gave him his way all the way through. * * * I signed that note after I had had the money, or after it was supposed to be turned over to me. I don't know which. Before we left the room I signed it." Respondent acknowledged that he gave Donaldson the \$1,000 and took his note, and during the trial of the case offered the note in evidence, but insists that it was for money loaned to him at that date. This note is dated October 31, 1898.

The law relative to duress at common law—and it is not materially changed by our statute—is well stated by Judge Walton in the case of *Hilborn v. Bucknam*, 78 Me. 482-485, 7 Atl. 272; 57 Am. Rep. 816. In that case the defendants had lost large quantities of meal from their mill, and they had obtained such proof as satisfied them that the plaintiff, in collusion with the

millar, had taken much, if not the whole, of it. After negotiations the plaintiff paid the defendant \$1,075 in cash, and gave a secured note for the further sum of \$425. Afterwards plaintiff brought suit to recover the sum of \$1,075 so paid from the defendant. The court said: "The plaintiff was at no time arrested. He was not in express terms threatened with arrest. It may be true, as contended by his counsel, that he was made to believe that he would be arrested if he did not settle, but no direct threats of arrest were made. But suppose such threats had been made—suppose that, instead of leaving it to inference, he had been told in so many words that if he did not settle he would be prosecuted both civilly and criminally—still, such threats under the circumstances disclosed in this case, would not constitute duress. It is not duress for one who believes that he has been wronged to threaten the wrongdoer with a civil suit. And if the wrong includes a violation of the criminal law, it is not duress to threaten him with a criminal prosecution. It is not to be supposed that a man smarting under a sense of wrong and injury, such as the defendants in this case had suffered, will not use some such threats. It is not in human nature to exercise such restraint. It is unreasonable to expect it, and the law does not require it. The law regards it as the duty of every one who knows of the commission of a crime to take measures to have the offender brought to justice, and it does not involve itself in the absurdity of making it unlawful for one to express to the offender an intention of doing what the law makes it his duty to do. There can be no doubt that the defendants believed, and had reason to believe, that they were sufferers by the plaintiff's wrong. By collusion with their miller, he had taken their corn or meal without their knowledge or consent, and had not accounted to them for it. He knew better than they how much he had taken. He consented to pay them one thousand and seventy-five dollars, and, in the opinion of the court, the evidence fails to disclose any legal or equitable ground for his recovering it back."

In the case of *Higgins v. Brown*, 78 Me. 473, 5 Atl. 269, the

court holds that mere threats of criminal prosecution, when no warrant has been issued or proceeding commenced, do not constitute duress. The court say: "There is not any evidence of threats, of impending danger, or personal violence. The threats, as stated by the defendant himself, amounted to nothing more than that the plaintiff was going to commence criminal proceedings. These threats were not connected with any prosecution then pending. No warrant had been issued, or proceedings commenced. Assuming the testimony of the defendant to be true, he does not exhibit such a state of affairs as would constitute duress according to the well-settled rules of law."

The question as to whether respondent was acting under duress in the morning of November 29th, because of Donaldson's acts with reference to the revolver, becomes immaterial in this case, because an examination of the record discloses the fact that the note sued upon was not given by the respondent on the morning of November 29th, but later on the same day, and under other circumstances, as disclosed by respondent in his testimony, as follows: "In the evening he came back into my room after supper, somewhere about seven o'clock on the same day, and said that he wanted the notes made, so that he could realize money readily for them; and I said the same as I did in the morning that I had no ready money, and that I wouldn't have anything more to do with it; and he made the same threats as he made in the morning—threatened to prosecute me and everything as he did in the first place, with the exception of exhibiting the gun—and he also held out the proposition that, if I would give him ready cash, I could make it \$500 less. I couldn't see any particular harm in changing it then, even if I had had it in my own way, but I says I had the same threats held over me that I did in the morning, and I changed the \$2,000 note. I gave him one note—this note here—for \$1,000, due in 60 days, and I gave him another, for \$500, due in two years, bearing 5 per cent. interest after maturity, and the agreement was that he would return the \$2,000 note over for this one and the \$500 note." Donaldson testifies to

the fact that the notes given by Smith on the morning of the 29th of November were not satisfactory to him, and that he took them back to him in the evening, surrendered them, and took new notes, one of which new notes is the note sued upon. So that it appears conclusively from the evidence of respondent that the only duress exercised against him in the evening of November 29th, when the note in question was given, was the same threats which he testifies were made to him in the morning of the 29th. He admits that in the evening no gun "was pulled," and no threat of taking his life was made.

Other significant circumstances were disclosed by the testimony: Respondent testifies that the threats and duress exercised on the morning of the 29th were in a room in a hotel in the town of Glendive. Respondent does not disclose that he made any outcry, or sought in any way or manner to obtain assistance to relieve him from conceived danger. Again, he says, although he had many friends in Glendive, whom he saw immediately after the alleged duress in the room on the morning of November 29th, he did not tell any of them about what had occurred. He says that the only person with whom he consulted was his attorney at Miles City, after he had returned from Glendive. It seems singular to us that, under all these circumstances, if his testimony of the transaction is true, he should have kept absolutely silent about it.

We are satisfied, from all the evidence introduced in the court below, that there is not sufficient evidence to sustain the verdict on the proposition that the note in question was made under duress or threats.

5. The court charged the jury as follows: "You are further instructed that if you should find from a preponderance of the evidence that there was some sheep stolen from the said Donaldson, and that the said Smith was connected with the larceny of the said sheep, and that the said Donaldson did not recover all of his sheep, and was damaged by reason of the larceny, such damage might form a legal consideration for a promissory note; but you are further instructed that if you find from

the evidence that there was connected with the same transaction a promise, either expressed or implied, on the part of Donaldson, not to prosecute or have the defendant, Smith, arrested, then such promise, whether expressed or implied, would vitiate and render null and void the entire transaction, and the note would then be without legal consideration, and it would be your duty to find for the defendant."

It appears that after the jury had retired, and before returning their verdict, they made a request in writing for further instructions, as follows:

"The definition or meaning of the words '*expressed or implied.*' "

Whereupon the court further instructed the jury as follows:

" '*Expressed*' means stated or declared in direct terms. That which is made definitely known in direct terms, and not left to implication. It is a rule that, when a matter or thing is expressed, it ceases to be implied by law.

" '*Implied*' is defined as contained in substance or essence, or by fair and reasonable inference or deduction, but not actually expressed; deducible by fair and reasonable inference."

The first part of the charge above quoted is correct, but we do not believe that the evidence adduced on the trial warranted the modification thereof found in the latter part of the charge quoted. We do not find in the evidence, after a careful and conscientious search, that any promise on the part of Donaldson that he would not prosecute, or have the defendant, Smith, arrested, was shown in any way or manner. Even the testimony of respondent does not disclose a scintilla of evidence tending to show that Donaldson promised him that, if the settlement was made, the respondent would not be prosecuted or arrested. Nor does it show any language or acts on the part of Donaldson from which such promise could be in any wise implied. So that, from all the testimony given in the case, we are of the opinion that the latter part of the charge above quoted was not based upon any testimony introduced at the trial, and was therefore erroneous. It is quite apparent that the jury con-

sidered the erroneous part of this instruction in their deliberations, and it is impossible to determine to what extent the verdict was influenced thereby.

6. The further question for consideration is as to the charge of the court upon the burden of proof. The charge, as given, contains no direct or separate instruction as to the burden of proof upon the defense pleaded—that the note in suit was executed under duress. By instruction No. 4 the jury was told that it devolved upon plaintiff to show not only that he secured the note in good faith and for a valuable consideration, but also that the note was made by defendant for a good and valuable consideration. Instruction No. 6 was in the following form: "The jury are further instructed that the burden of proof in this class of cases is always upon the party holding the affirmative. That would be upon the plaintiff in this action. And you are instructed that any matter asserted by one party and denied by the other can only be proved in law by a preponderance of the evidence. If you find that the evidence bearing upon the plaintiff's case is evenly balanced, or that it preponderates in favor of the defendant, then the plaintiff cannot recover, and you should find in favor of the defendant." The court refused plaintiff's instructions Nos. "h" and "i," requested upon the question of duress; being misled, possibly, by the language of this court in the case of *Rossiter v. Loeber*, 18 Mont. 372, 45 Pac. 560.

By this action we are led to believe that, in the view of the court below, the burden was upon the plaintiff to show by a preponderance of evidence, in addition to the matters specified in instruction No. 4, or as included therein, that the note sued upon was executed without duress. In this view the court was, in our opinion, wrong, but blamelessly so, because of the somewhat careless and inaccurate language of this court used in the case of *Rossiter v. Loeber*, *supra*. There is no doubt but that, when a suit is brought by an indorsee or assignee of a nonnegotiable note, the burden of proof is upon him to show that the note was originally issued upon a valuable consideration, and

that he is a *bona fide* holder thereof; but, in our judgment, there is no warrant in the law for holding that the burden is also upon him to show that no other defense existed to the note.

This court, in *Rossiter v. Loeber, supra*, said: "Written obligations, whether for a debt due or not, made under such circumstances, will not be enforced at the instance of the person who takes them with notice of the circumstances connected with their inception, as plaintiff in this case clearly did, if the maker plead and prove such duress as a valid defense. Duress having been proved on the trial, the question of no consideration is immaterial to the further discussion of the case. Accordingly it was error in the district court to instruct that it was incumbent upon the defendant to establish his defense of duress and compulsion *and* want of consideration by a preponderance of the evidence, and, if he failed to do so, plaintiff should recover. He was not bound to prove both such defenses. Either, if established, would defeat a recovery by plaintiff." Thus far no misunderstanding of what this court meant could arise, but from the following language, which was merely by way of dictum, some confusion might, and doubtless would, arise: "What we have heretofore laid down, namely, that the burden of proving that plaintiff was a holder in good faith was always upon him, relieved defendant of establishing the defense of duress by a preponderance of evidence. It was always upon plaintiff alone, who acquired this note subject to the defenses which might be interposed by defendant against its payment, to prove his *bona fides*, to entitle him to recover." The opinion in that case, upon careful examination, does not disclose the fact that plaintiff introduced, or even offered, any evidence tending to show that he purchased the note for a valuable consideration in the regular course of business; and it does disclose that he acquired the same with full knowledge of the duress practiced upon the defendant. So that the presumption which attaches to a holder in good faith for a valuable consideration, without notice of defenses, did not arise. Speaking generally, duress, like fraud, may be pleaded as a defense to a contract; but the

burden of proving such defense by a preponderance of the evidence is upon the party alleging it, except under special circumstances, none of which appear in this case. Therefore, if the holdings announced in this opinion are in conflict with those announced in *Rossiter v. Locher, supra*, that case is overruled to the extent of such conflict.

Many other errors are relied upon, but we believe that sufficient has been said to fully present our views of the entire case in such manner as to enable the court below to try the case correctly.

We recommend that the judgment and order appealed from be reversed.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the cause remanded.

MR. JUSTICE MILBURN, disqualified.

SMALL, APPELLANT, v. RAKESTRAW, RESPONDENT.

(No. 1,592.)

(Submitted May 29, 1903. Decided June 16, 1903.)

Public Lands—Homestead — Residence — Decision by Land Department—Review by the Courts—Patents — Trustee—Evidence.

- 1 A residence for voting purposes in another precinct than that in which land is situated precludes an entryman from claiming residence at the same time on the land for homestead purposes.
- 2 The question of an entryman's residence upon the land and the *bona fides* of his settlement thereon is one of fact the determination of which by the officers of the land department is conclusive upon the courts, in the absence of fraud or imposition.
- 3 It not appearing that the secretary of the interior, in holding that one claiming under the homestead law had not complied therewith as to real-

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dence, had no other evidence before him than that he had a residence for voting purposes in another precinct, it cannot be said that his decision was on an erroneous construction of the law, so as to allow interference by a court, even if his holding that residence for voting purposes in one precinct precluded his claiming residence at the same time on land in another precinct for homestead purposes was wrong.

4. That the holder of the legal title under a patent may be adjudged to hold it as trustee for plaintiff, because of an erroneous ruling of the land department, it is necessary to show not only that defendant was not entitled to the patent, but that plaintiff was so entitled.

Appeal from District Court, Flathead County; D. F. Smith, Judge.

ACTION by Walter W. Small against Samuel O. Rakestraw. Judgement for defendant. Plaintiff appeals. Affirmed.

Messrs. Foot & Pomeroy, for Appellants.

A court of equity will not permit a nonjudicial or a quasi-judicial officer, in any proceedings before him, by the misconstruction of any law, to take property from one person, under the law entitled to it, and give it to another. (*Johnson v. Towsley*, 13 Wall. 72; *Sanford v. Sanford*, 139 U. S. 642; *Hawley v. Diller*, 178 U. S. 476, 20 Sup. Ct. Rep. 986; *Baldwin v. Starks*, 107 U. S. 463, 465, 27 L. Ed. 526, 2 Sup. Ct. Rep. 473; *Cornelius v. Kessel*, 128 U. S. 456, 461, 32 L. Ed. 482, 9 Sup. Ct. Rep. 122; *Quinby v. Conlon*, 104 U. S. 420, 426, 26 L. Ed. 800, 802; *Rector v. Gibbon*, 111 U. S. 276, 4 Sup. Ct. Rep. 605, 612; *Bernier v. Bernier*, 147 U. S. 242, 13 Sup. Ct. 244, 246; *Northern Pac. R. Co. v. Colburn*, 164 U. S. 383, 17 Sup. Ct. Rep. 98; *Northern Pacific R. Co. v. McCormick*, 19 C. C. A. 165, 167; *United States v. Northern Pacific R. Co.*, 37 C. C. A. 290, 296; Note 2 in *Hartman v. Warren*, 22 C. C. A. 40; *Hartman v. Smith*, 7 Mont. 19-29; *Colburn v. Northern Pac. R. Co.*, 13 Mont. 476; *Moore v. N. P. R. Co.*, 18 Mont. 290; *Murray v. Mont. Lumber & M. Co.*, 25 Mont. 14.)

Voting in a different precinct from that in which the land is located may be an illegal act, and as such subject the entryman

to punishment for illegal voting, but it does not necessarily work a forfeiture of his established place of residence or property rights. (*Spaulding v. Steele* (Mich.), 88 N. W. 627; *Dickenson v. Inhabitants of Brookline* (Mass.), 63 N. E. 331; *Hoscall v. Hafford* (Tenn.), 65 S. W. 423; *California v. Sevoy*, 9 L. D. 142.)

A residence once established or acquired is presumed to continue until it is shown to have been changed. (5 Ency. Law (1st Ed.), p. 865, paragraph 4, note 1; 6 Ency. Law (1st Ed.), p. 123 and notes; Vol. I, Rice on Evidence, p. 85, citing *Mitchell v. United States*, 88 U. S., 21 Wall. 350, 22 L. Ed. 584; Wharton on Evidence, Vol. 2, Sec. 1285, p. 465.)

Before abandonment can be established, change of residence must be clearly shown. The most important and the all necessary element in establishing or changing a residence is the intention of the party. With this must be coupled the act. The union of the two is indispensable. This rule is recognized by the department in the case of *Anderson v. Anderson*, 5 L. D. 6, 7, and in *William Penrose*, 5 L. D. 179. "To constitute the new domicile two things are indispensable: First, residence in the new locality; and, second, the intention to remain there. The change cannot be except *facto et animo*. Both are alike necessary. Either without the other is insufficient." (*Mitchell v. United States*, 88 U. S. 21 Wall. 350, 22 L. Ed. 584, 588.) The place where a person lives and makes his home in his domicile. (*Id.*) The land department has recognized that domicile and residence are convertible terms in the decision of Secretary Lamar *In re James Woodley*, 4 L. D. 198, 200.

"A settlement cannot be made upon public lands already occupied; as against existing occupants, the settlement of another is ineffectual to establish a preemptive right. Such is the purport of the decisions in *Atherton v. Fowler*, 96 U. S. 513, XXIV, 732, and *Hosmer v. Wallace*, 97 U. S. 575, XXIV, 1130." (*Quinby v. Conlon*, 104 U. S. 420-427, 26 L. Ed. 800-801.) The findings are that the plaintiff and the man

sent by him to cultivate the land were driven from it by defendant in the year 1891. "One who occupies public land against the will and over the protest of one having a homestead entry upon such land is a trespasser." (*Glover v. Swartz*, 58 Pac. (Okla.) 943, 944, and many cases therein cited.) "An adverse claimant will not be allowed to take advantage of his own wrongful acts in preventing an entryman from maintaining a continuous residence." (Secretary Smith in *Johnston v. Harris*, 20 L. Ed. 183; *Vaughan v. Gammon*, 27 L. D. 438, 444.) A court of equity will decree that the defendant holds the legal title as trustee for the plaintiff. (*Stark v. Starr*, 73 U. S., 6 Wall. 102, 18 L. Ed. 925; *Cornelius v. Kessel*, *Baldwin v. Stark*, *Hawley v. Diller*, *Rector v. Gibbon*, *Quinby v. Conlon*, and numerous other cases cited *supra*.)

MR. COMMISSIONER CALLAWAY prepared the opinion for the court.

On demurrer to complaint. The substance of the complaint is that in a contest for a tract of land between the plaintiff here, Walter W. Small, and the defendant here, Samuel O. Rakestraw, before the land department, the secretary of the interior erroneously decided in favor of Rakestraw, and that, had it not been for the wrongful acts of the defendant, and the erroneous ruling of the secretary, patent for the land would have issued to plaintiff. The prayer of the complaint is that the defendant shall be decreed to hold the title to the land in trust for the plaintiff, and convey it to him. To this complaint the defendant interposed a demurrer, alleging that "the court has no jurisdiction of the cause, or the subject-matter thereof," and that the complaint does not state facts sufficient to constitute a cause of action. The court sustained the demurrer, and, the plaintiff refusing to amend, judgment was entered for defendant for costs. From this judgment, the plaintiff appeals.

Plaintiff alleges that he settled upon the land in controversy during the latter part of the year 1886, and resided thereon

continuously until after he submitted final proof upon his homestead claim to the land department. The lands became subject to entry on August 16, 1891, under the laws of the United States, and on the day following the plaintiff entered the same under the homestead law, and on January 26, 1892, made final proof in furtherance of such entry. March 26, 1892, Rakestraw filed an affidavit of contest against appellant's homestead entry, charging that Small had failed to comply with the United States law as to residence. The hearing was had before the register and receiver of the local land office, which resulted in favor of Rakestraw. Small thereupon appealed to the commissioner of the general land office, who found in his favor, and ordered the contest dismissed. Rakestraw then appealed to the secretary of the interior, who reversed the decision of the commissioner, and ordered Small's homestead entry canceled. In giving his opinion, the secretary said: "Plaintiff filed his affidavit of contest against the defendant's homestead entry, charging that the entryman had failed to comply with the law as to residence. The testimony of Small himself is that he never voted in the precinct in which his homestead entry lies, but did vote at other points, a long distance from his homestead, at least twice during the time he claims he was seeking to maintain residence upon the land. He runs a carpenter shop in town, and, to use his own words, 'determined to return to the ranch only often enough to keep a good showing of habitation.' His excuse for that was that the plaintiff threatened him with violence if he undertook to stay on the land. Without passing upon any other question, it is enough to say that a residence for voting purposes in another precinct from the land precludes an entryman from claiming residence at the same time on the land for homestead purposes. (*George T. Burns*, 4 L. D. 62; *Hart v. McHugh*, 17 L. D. 176; *Edwards v. Ford and O'Connor*, decided June 18, 1894.)"

Plaintiff contends that, in saying "a residence for voting purposes in another precinct from the land precludes the entryman from claiming residence at the same time on the land for

homestead purposes," the secretary committed such "a gross mistake and misapplication and misconstruction of the law" as brings this case within the rule that whenever it is made to appear to a court of equity that the officers of the land department have issued a patent to the wrong person by reason of a mistaken application of the law to the facts in the case, the court will, in a proper proceeding, interfere, and control the determination of the department so as to secure the just rights of the parties injuriously affected. In coming to his determination as to the plaintiff's residence upon the land, and the *bona fides* of his settlement thereon, the secretary passed upon questions of fact, whereof he was the exclusive judge, in the absence of fraud or imposition, and neither is shown in this case.

Plaintiff says that the secretary was in error in drawing a conclusive presumption of abandonment from the fact that plaintiff voted in Granite and Bonner, precincts other than the one in which his homestead claim was. Granite is in another county. What other evidence touching the question of plaintiff's residence for voting purposes may have been before the secretary, we do not know, as it does not appear from the complaint that the only facts before him on that subject were those relating to plaintiff's voting at Granite and Bonner. The question of residence is one of fact. (*McHarry v. Stewart* (Cal.), 35 Pac. 141; *Stewart v. McHarry*, 159 U. S. 643, 16 Sup. Ct. 117, 40 L. Ed. 290.)

From the facts before him, the secretary decided that the plaintiff had not resided upon his homestead continuously for the five years prior to January 26, 1892. On the contrary, he found that the plaintiff had established a residence elsewhere for voting purposes during that time. And we think the secretary's statement that "*a residence for voting purposes* in another precinct from the land precludes an entryman from claiming residence at the same time on the land for homestead purposes" is correct. Whether the secretary erred in his finding upon the facts submitted to him is immaterial in this inquiry. It makes no difference what our conclusion on the subject might

be. (*Bohall v. Dilla*, 114 U. S. 47, 5 Sup. Ct. 782, 29 L. Ed. 61.)

"The officers of the land department are specially designated by law to receive, consider, and pass upon proofs presented with respect to settlements upon the public lands, with a view to secure rights of pre-emption. If they err in the construction of the law applicable to any case, or if fraud is practiced upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties, founded upon their decisions; but, for mere errors of judgment upon the weight of evidence in a contested case before them, the only remedy is by appeal from one officer to another of the department." (*Shepley v. Cowan*, 91 U. S. 340, 23 L. Ed. 424, quoted in *Moore v. Robbins*, 96 U. S. 530, 24 L. Ed. 848.)

In *Lee v. Johnson*, 116 U. S. 48, 6 Sup. Ct. 249, 29 L. Ed. 570, Mr. Justice Field, speaking for the court, said: "Without going into any detail of the evidence presented to the commissioner and the secretary of the interior, but taking the general statement of its nature, which we have given, it is clear that their attention was drawn by it to the character of the settlement of Johnson, and that they considered whether his entry was made to acquire a home for himself or for his son-in-law, whether his residence had been sufficiently personal and continuous to save and perfect any right, if in fact he had ever initiated and, and whether or not he had abandoned the land. The findings of the secretary upon any of these matters must be taken as conclusive, in the absence of any fraud and imposition such as we have mentioned. Upon this point it is only necessary to refer to the cases where this conclusive character of the action of the department upon matters of fact cognizable by it has been expressly affirmed. *Johnson v. Towsley*, 13 Wall. 72, 20 L. Ed. 485; *Shepley v. Cowan*, 91 U. S. 330, 340, 23 L. Ed. 424; *Moore v. Robbins*, 96 U. S. 530, 535, 24 L. Ed. 848; *Quinby v. Conlan*, 104 U. S. 420, 426, 26 L. Ed. 800; *Smelting Co. v. Kemp*, 104 U. S. 636, 640, 26 L. Ed. 875; *Steel v.*

Smelting Co., 106 U. S. 447, 450, 27 L. Ed. 226." (And see *Murray v. Montana Lumber & Manufacturing Co.*, 25 Mont. 14, 63 Pac. 719; *Sanford v. Sanford*, 139 U. S. 642, 11 Sup. Ct. 666, 35 L. Ed. 290.)

"It would lead to endless litigation and be fruitful of evil if a supervisory power were vested in the courts over the action of the numerous officers of the land department, on mere questions of fact presented for their consideration." (*Quinby v. Conlan*, 104 U. S. 430, 26 L. Ed. 800.)

The following language in *Moore v. Northern Pacific Railroad Company*, 18 Mont 290, 45 Pac. 215, is applicable to this case: "Counsel for appellant contends that decisions of the secretary of the interior, made solely on the construction of the law, may be attacked in this proceeding; but it nowhere appears that the land contest between plaintiff and defendant was determined by the secretary of the interior upon a construction of the law only. As far as the record shows, the secretary passed upon the facts, and we cannot say that his decision was arrived at from a construction of the law only. Decisions are generally rendered upon a consideration of both law and facts." (See *Power v. Sla*, 24 Mont. 243, 61 Pac. 468.)

The plaintiff contends, however, that a settlement cannot be made upon public lands already occupied, and therefore the defendant had no right to obtain the patent, for the reason that he initiated his claim to the land in controversy by trespass upon the plaintiff. In answer to this contention, we quote the following from the opinion of the court in *Bohall v. Dilla*, *supra*: "To charge the holder of the legal title to land under a patent of the United States, as a trustee of another, and to compel him to transfer the title, the claimant must present such a case as will show that he himself was entitled to the patent from the government, and that, in consequence of erroneous rulings of the officers of the land department upon the law applicable to the facts found, it was refused to him. It is not sufficient to show that there may have been error in adjudging the title to the patentee. It must appear that by the law, prop-

erly administered, the title should have been awarded to the claimant. (*Smelting Co. v. Kemp*, 104 U. S. 636, 647, 26 L. Ed. 875; *Boggs v. Merced Mining Co.*, 14 Cal. 279, 363.) It is therefore immaterial for the decision of this case what our judgment may be upon the conclusions of those officers as to the possession of the patentee."

We are of the opinion that the complaint does not state facts sufficient to invoke the action of a court of equity, and therefore the judgment should be affirmed.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment is affirmed.

FARLEIGH ET AL., RESPONDENTS, v. KELLEY,
APPELLANT.

(No. 1,575.)

(Submitted May 14, 1903. Decided June 19, 1903.)

Wills—Probate—Contest—Burden of Proof—Right to Open and Close—Evidence—Conspiracy—Subscribing Witness—Absence from State—Impeachment.

1. Under Code of Civil Procedure, Section 2340, in a will contest, the contestants have the burden of proof, and are entitled to open and close.
2. In a will contest, where contestants alleged that petitioner and others conspired to defraud contestants out of their rights as heirs of deceased, and, pursuant to such conspiracy, had forged the will sought to be probated, evidence that, before this will was offered for probate, petitioner had procured her appointment as administratrix of deceased's estate, falsely alleging that she was his only heir, and, while acting as such administratrix, had sold a large portion of the property of the estate to her husband, and that contestants had instituted an action to have such proceedings and sale set aside, was admissible, under Code of Civil Procedure, Section 2340.
3. On the probate of a will, where the subscribing witnesses are out of the state, evidence that they had made statements contradictory of the facts contained in the attestation clause, and evidence that the reputation of such subscribing witnesses for honesty and integrity is bad, is admissible.

28	421
29	54
28	421
31	467
32	98

4. In a will contest, where contestants had alleged that petitioner and others had conspired to defraud them of their rights as heirs of deceased, evidence that petitioner's husband, who was acting as her agent with reference to the estate, had asked the clerk of the district court to write to one of contestants, in answer to an inquiry as to the estate, that the property was not very valuable, and that petitioner had written a letter to the inquiring heir, stating that the estate had been settled and the property left to petitioner, was admissible, as tending to prove the charge of conspiracy.
5. In a will contest, evidence that one of the subscribing witnesses had, some years after the execution of the will, brought the document to witness and explained his possession of it, was inadmissible.
6. Extrajudicial declarations, not under oath, corroborating testimony given in court, cannot be received.
7. Where evidence is offered as a whole, and part of it is incompetent, the exclusion of all of it is not error.
8. In a will contest, evidence that witness had, prior to the date of the trial, met one of the subscribing witnesses of the alleged will, who said that a certain person had given him money with which to leave the state, and that he was going to leave, and that the person who had advanced the money had contracted with contestants to buy whatever interest in certain property they acquired from the estate, was inadmissible; the absence of the subscribing witness having been already sufficiently accounted for.

Appeal from District Court, Jefferson County; Henry C. Smith, Judge.

PETITION by Caroline V. Kelley for the probate of an instrument purporting to be the last will of John D. Allport, deceased, to which Lillie Sue Farleigh and others filed objections as contestants. From an order overruling a motion for a new trial, petitioner appeals. Affirmed.

STATEMENT OF THE CASE.

On July 3, 1899, the appellant, Caroline V. Kelley, filed in the district court of Jefferson county her petition for the probate of an instrument in writing purporting to be the last will of John D. Allport, deceased, and to have been executed October 18, 1895. The petition sets forth the jurisdictional facts; alleges that the property left by the deceased was approximately of the value of \$26,000; that petitioner is a sister of deceased; and then gives the names and residences of other relatives. By the terms of the alleged will, the petitioner is made sole legatee, and nominated executrix without bonds. On July 29, 1899, respondents filed their written grounds of opposition to the

probate of the alleged will. These grounds are that the prof-
fered instrument is not the will of John D. Allport, and that
he never made a will, but died intestate. It is then alleged that
the contestants Lillian Sue Farleigh and Mary A. Miller are
sisters of deceased; that the contestant Devincy Allport is a
brother of deceased; that contestant Frances C. Wellman is a
daughter and only heir of Calista Coolidge, deceased, who was
a sister of John D. Allport; and that the contestants are enti-
tled to share in the estate. As a further ground of contest, the
contestants then set forth facts which they claim show a con-
spiracy on the part of the petitioner and other parties to them
unknown to cheat and defraud the contestants out of their in-
terests in Allport's estate. It is alleged that, for the purpose
of carrying out this conspiracy, immediately after the death of
Allport, which occurred November 26, 1895, the petitioner,
Caroline V. Kelley, who then resided in Denver, Colorado,
came to Montana and filed her petition for letters of adminis-
tration of the estate of Allport, in which she falsely alleged
that she was the only heir of the deceased; that she thus fraudu-
lently procured letters of administration to be issued to her as
administratrix; that appraisers were appointed to appraise the
property belonging to such estate, and that the petitioner falsely
withheld from them the knowledge that certain valuable mining
claims situated in Jefferson and Silver Bow counties belonged
to such estate; that she procured an order for the sale of certain
real property belonging to the estate to be made, and under
such order she sold nearly all the property to her husband,
George H. Kelley; that she procured an order of partial dis-
tribution to be made, upon the hearing for which she again
falsely claimed to be the only heir of the deceased, to whom all
of the estate thus distributed was transferred; that these con-
testants then discovered the facts above set forth, and, upon
filing their petition alleging their relationship to the deceased
and their interest in his estate, the petitioner, Caroline V.
Kelley, admitted such relationship and interest, and the decree
of distribution was set aside; that thereafter the said Caroline

V. Kelley, in furtherance of the conspiracy charged, procured to be forged a writing purporting to be the last will of John D. Allport, deceased, and commenced proceedings to have the same admitted to probate (in this alleged will these contestants were not mentioned at all, and were excluded from sharing in the estate); that these contestants filed their protest to the probate of the same; that issues were joined, and the cause set for trial to a jury, but before the conclusion of the trial the petition was, on the application of petitioner, withdrawn, and the proceedings dismissed; that thereafter such petitioner and others to contestants unknown, in furtherance of such conspiracy, procured to be forged the writing dated October 18, 1895, purporting to be the last will of said Allport, by the terms of which the said Caroline V. Kelley was made sole legatee, and nominated executrix without bonds. To these written objections the petitioner filed a reply (so called), denying all the material allegations contained in the written opposition. The cause came on for trial before the court and a jury, and upon application of contestants, and over the objections of the petitioner, the court ruled that the contestants had the burden of proof, and should open and close, after the petitioner had made formal proof of the execution of the alleged will, and that the contestants had the right to open and close the argument to the jury.

In answer to the several special interrogatories propounded, the jury found against the petitioner, and declared that the instrument offered was not the will of John D. Allport. From an order overruling petitioner's motion for a new trial, this appeal is taken.

Mr. T. J. Walsh, Mr. B. H. Giles, and Mr. George F. Cowan,
for Appellant.

In a will contest the right of the proponent to open and close the case to the jury is established by an almost unbroken line of American authorities. Whether the proceedings are for a proof of the will in "solemn form," after it has been admitted

to probate in "common form," whether by bill in chancery after it is formally admitted by the probate court, or whether it takes the form of a "contest," such as is provided for by our statute, seems to make little difference. (*Hubbard v. Hubbard*, 7 Oregon, 42; 12 Ency. Pl. & Pr. 197; 1 Greenleaf on Evidence, 77; 1 Thompson on Trials, 239; Bailey on *Onus Probandi*, 389; Rice on Am. Probate Law, 54; Horner's Probate Law, 71; *Brooks v. Barrett*, 7 Pick. 94; *Seebrook v. Fedawa*, 30 Neb. 424; *Hardy v. Merrill*, 56 N. H. 227; *Taff v. Hosmer*, 14 Mich. 309; *Patten v. Cilley*, 42 Atl. 47; *Roger v. Thomas*, 1 B. Mon. 930; *Taylor v. Cox*, 153 Ill. 220-231; *Mayo v. Jones*, 78 N. C. 402; *Comstock v. Society*, 8 Conn. 254; Sec. 1080, Code of Civil Procedure, as amended by Act of March 1, 1897, Laws of 1897, page 241; *McCutcheon v. Loggins* (Ala.), 19 So. 810; *Woodruff v. Hundley* (Ala.), 32 So. 570; *Jamison v. Jamison* (Del.), 3 Houst. 112; *Rich v. Lemmons* (D. C.), 15 App. Ct. 507; *Potts v. House*, 6 Ga. 324; *Thompson v. Bennett*, 194 Ill. 57; *Morell v. Morell*, 157 Ind. 179; *Crowninshield v. Crowninshield*, 67 Mass. 524; *Kempsey v. McGinniss*, 21 Mich. 147; *Ankin v. Weckerly*, 19 Mich. 502; *Harvey v. Heirs of Sullins*, 56 Mo. 373; *Boardman v. Woodman*, 47 N. H. 120; *Syne v. Boughton*, 85 N. C. 367; *Brown v. Griffith*, 11 Ohio St. 329; *Banning v. Banning*, 12 Ohio St. 437; *Runyan v. Price*, 15 Ohio St. 1; *Nicols v. Kershner*, 20 W. Va. 253; *Kerr v. Lunsford*, 31 W. Va. 659, S. C. 8, S. E. 493; *Kaine v. Trustees*, 5 N. W. 838; *Aultman v. Falkum*, 47 Minn. 414; *Carpenter v. First Nat'l Bank*, 199 Ill. 352; *Bradley v. Brady* (Ill.), 50 N. E. 124.)

The denial of the right of opening and closing a case to the jury constitutes reversible error. (*Tobin v. Jenkins*, 29 Ark. 151; *Mann v. Scott*, 32 Ark. 593; *Manseur v. Implement Co.*, 61 Ark. 627; *Royce v. Gazan*, 76 Ga. 79; *Sohn v. Jervis*, 101 Ind. 573; *Peed et al. v. Brennan*, 89 Ind. 252; *Crabtree v. Atchison*, 93 Ky. 338; *Lucas v. Hunt*, 91 Ky. 279; *Wright's Admr. v. N. W. etc. Ins. Co.*, 91 Ky. 208; *Abot v. Sugura*, 5 Martin, N. S. 73; *Johnson v. Josephs*, 75 Me. 544; *Edelen*

Admr. v. Edelen, 6 Md. 288; *Spaulding v. Hood*, 8 Cush. 602; *Robson v. Harrison*, 11 Cush. 40; *Hickman v. Layne*, 47 Neb. 177; *Rea v. Bishop*, 41 Neb. 202; *Millerd et al. v. Thorn*, 56 N. Y. 402; *Murray v. Ins. Co.*, 85 N. Y. 236; *Conselyea et al. v. Swift*, 103 N. Y. 604; *Hudson v. Weherington*, 79 N. C. 3; *Stewart v. Bledsoe*, 85 N. C. 473; *Addison v. Duncan*, 35 S. C. 165; *Bennett v. Sandifer*, 15 S. C. 165; *Sanders v. Bridges*, 67 Tex. 93; *R. R. Co. v. Strand*, 4 Wash. 311; *Hall v. Dairy Co.*, 15 Wash. 542; *Sammons v. Hanvers*, 25 W. Va. 678.)

Messrs. Walsh & Newman, Mr. Robert B. Smith, and Mr. Charles R. Leonard, for Respondents.

The court did not err in granting the contestants the right to open and close. (Code of Civil Procedure, Sec. 2340, div. 4; Code of Civil Procedure, Sec. 1080, as amended by Act of March 1, 1897; *In re Doyle*, 73 Cal. 564, 15 Pac. 125; *Allen v. Griffin*, 65 Wis. 529, 35 N. W. 21; *McCulloch v. Campbell*, 5 S. W. 590; Underhill on Wills, Sec. 165, p. 231; *McDonald v. McDonald*, 41 N. E. 336; *Patten v. Cilly*, 42 Atl. 47; *Schoff v. Laithe*, 58 N. H. 503; *Rogers v. Kendrick*, 63 N. H. 335; *Manufacturing Co. v. Head*, 59 N. H. 332; *Hilliard v. Beattie*, 50 N. H. 462; *Scott v. Hull*, 8 Conn. 296, p. 303; *Blume v. Hartman*, 8 Atl. 219.)

The discretion of the court in granting or refusing the right to open and close, is not reviewable on appeal, and is not reversible error. (*Marshall v. Am. Express Co.*, 7 Wis. 1; *Kaime v. Trustees Village of Ormo* (Wis.), 5 N. W. 838; *Elderkin v. Wiswell* (Wis.), 21 N. W. 541; *Austin v. Austin*, 45 Wis. 526; *Viele v. German Ins. Co.*, 26 Ia. 9; *Preston v. Walker*, 26 Ia. 205; *Smith v. Cooper*, 9 Ia. 379; *Woodward v. Laverty*, 14 Ia. 383; *White v. Adams*, 77 Ia. 295; *Van Horn v. Smith*, 59 Ia. 142; *Dent v. Smith*, 53 Ia. 262; *Delaware v. Duncat*, 48 Ia. 488; *Ashurst v. Grub*, 47 Ia. 353; *Aultman v. Falkum*, 47 Minn. 414; *Carpenter v. First Nat'l Bank of*

Joliet, 119 Ill. 352; *Park v. Durham*, 85 Ill. 569; *Valley v. Teewalt*, 79 Va. 421; *Day v. Woodworth*, 13 How. 363; *Hall v. Weare*, 92 U. S. 728; *Lancaster v. Collins*, 115 U. S. 222; *Scott v. Hall*, 8 Conn. 303; *Florence O. R. Co. v. Farrar*, 109 Fed. 254; *Cheek v. Watson*, 90 N. C. 307; *Moore v. Brown*, 6 S. E. 833; *Smith v. Fullenweider*, 19 Pac. 314; *Bradley v. Brady* (Ill.), 50 N. E. 124; *Nash's Pl. & Pr.*, 2d Nash, 972.)

MR. JUSTICE HOLLOWAY, after stating the case, delivered the opinion of the court.

1. Had the contestants the right to open and close the case? It is considered by the petitioner that so long as she was required to make some proof in the first instance, even though it be formal in character, and only such as she would be required to make in case no contest had been inaugurated, she was entitled to open and close the case, and in deciding against this contention the district court committed prejudicial error.

Whatever may be the rule in other jurisdictions, where peculiar statutory provisions have entered into the determination of the question, there can scarcely be any serious controversy as to the proper practice in this state. If the issues to be tried were raised upon the allegations of the petition for probate, and the objections made thereto in the written opposition of contestants, it would then seem reasonable that the burden would be cast upon the petitioner to maintain by a fair preponderance of the evidence the allegations of her petition, and this burden would carry with it the right to open and close, but such is not the case. The proceedings for the contest of a will (before probate) are provided for in Sections 2340-2346 of the Code of Civil Procedure. Paraphrased, Section 2340 would read: The contestants must file written grounds of opposition to the will offered, and serve a copy on the petitioner, who may demur thereto upon any grounds for which a demurrer to a complaint in a civil action may be interposed. If the demurrer be sustained, the contestants may amend their written

opposition. If petitioner's demurrer be overruled, she may file her answer traversing or otherwise obviating or avoiding the allegations of the written opposition, and the issues of fact raised by these two pleadings—(1) the written grounds of opposition, and (2) the petitioner's answer thereto—and none others, must be tried, by a jury if demanded; and upon such trial the contestants are the plaintiffs, and the petitioner is the defendant.

The issues to be tried, then, are raised by the allegations of the plaintiffs' (contestants') written grounds of opposition or complaint, and the defendant's (petitioner's) answer thereto. Thus the actual trial of the contest is not initiated until the proffered will is before the court (not the jury) upon the formal proof necessary to the probate of an uncontested will. The very fact that the petitioner's answer need be nothing more than a general denial of the allegations contained in the written grounds of opposition emphasizes the evident intention of the legislature that the contestants shall have the laboring oar throughout the trial. No other construction can be given to the language of Section 2340, above, and the plain meaning of the terms employed, be preserved.

The contestants are the plaintiffs. They have the burden of proof imposed upon them, and with that they have the right to open and close. (Section 1080, Code of Civil Procedure, as amended by Act Fifth Legislative Assembly, approved March 1, 1897 [Laws of 1879, p. 241].) Section 1312 of the California Code of Civil Procedure is in terms identical with Section 2340, above, and received a construction in *In re Doyle's Estate*, 73 Cal. 564, 15 Pac. 125, in which Temple, J., concurring, said: "The same procedure is made applicable to a contest after the will has been admitted to probate as before. In both, the contestant has the laboring oar, as though he is attacking something which he must overcome by affirmative proof. Under such circumstances, I think the theory of the statute must be that the contest begins after the petitioner has made his *prima facie* case. In such case the burden would naturally

be on the contestant, and all the provisions consistent and harmonious."

2. Contestants were permitted to make proof of the proceedings had in the administration of Allport's estate, of the attempt to probate the former will, of the transfer by Caroline V. Kelley to her husband, George H. Kelley, of a large portion of the property belonging to the estate, and of the proceedings instituted in the district court to recover such property back into the estate. Of this complaint is now made.

We are of the opinion that the evidence was properly admitted. Under Section 2340, above, the issues formed upon the contest of a will may involve the competency of the testator, his freedom from duress, etc., the due execution of the will, or any other question substantially affecting the validity of the will. In this instance the pleadings put in issue the due execution and attestation of the will offered, and the question of the existence of a conspiracy formed by the petitioner and unknown parties to defraud the contestants out of their interests in the estate by successive attempts to have the property transferred to the petitioner, and, when all efforts had failed, by forging, or procuring to be forged, the alleged will offered for probate. The petitioner interposed a motion to strike out all allegations with reference to the conspiracy charged, but no error is predicated upon the court's denial of the motion, and no question is made as to the sufficiency of the pleading.

The evidence offered tended to prove the allegations of the written opposition; tended to show the improbability that the will in controversy is genuine, and to disclose the motives of the petitioner in offering it. It cannot be said that the only possible issues which can arise upon the contest of a will are such as involve the competency of the decedent to make a will, or his freedom from duress, menace, fraud, or undue influence, or the due execution or attestation of the will itself, for, if this be so, Subdivision 4 of Section 2340, above, is meaningless. Any question, other than these just enumerated, which affects

V. Kelley, in furtherance of the conspiracy charged, procured to be forged a writing purporting to be the last will of John D. Allport, deceased, and commenced proceedings to have the same admitted to probate (in this alleged will these contestants were not mentioned at all, and were excluded from sharing in the estate); that these contestants filed their protest to the probate of the same; that issues were joined, and the cause set for trial to a jury, but before the conclusion of the trial the petition was, on the application of petitioner, withdrawn, and the proceedings dismissed; that thereafter such petitioner and others to contestants unknown, in furtherance of such conspiracy, procured to be forged the writing dated October 18, 1895, purporting to be the last will of said Allport, by the terms of which the said Caroline V. Kelley was made sole legatee, and nominated executrix without bonds. To these written objections the petitioner filed a reply (so called), denying all the material allegations contained in the written opposition. The cause came on for trial before the court and a jury, and upon application of contestants, and over the objections of the petitioner, the court ruled that the contestants had the burden of proof, and should open and close, after the petitioner had made formal proof of the execution of the alleged will, and that the contestants had the right to open and close the argument to the jury.

In answer to the several special interrogatories propounded, the jury found against the petitioner, and declared that the instrument offered was not the will of John D. Allport. From an order overruling petitioner's motion for a new trial, this appeal is taken.

Mr. T. J. Walsh, Mr. B. H. Giles, and Mr. George F. Cowan,
for Appellant.

In a will contest the right of the proponent to open and close the case to the jury is established by an almost unbroken line of American authorities. Whether the proceedings are for a proof of the will in "solemn form," after it has been admitted

to probate in "common form," whether by bill in chancery after it is formally admitted by the probate court, or whether it takes the form of a "contest," such as is provided for by our statute, seems to make little difference. (*Hubbard v. Hubbard*, 7 Oregon, 42; 12 Ency. Pl. & Pr. 197; 1 Greenleaf on Evidence, 77; 1 Thompson on Trials, 239; Bailey on *Onus Probandi*, 389; Rice on Am. Probate Law, 54; Horner's Probate Law, 71; *Brooks v. Barrett*, 7 Pick. 94; *Seebrook v. Fedawa*, 30 Neb. 424; *Hardy v. Merrill*, 56 N. H. 227; *Taff v. Hosmer*, 14 Mich. 309; *Patten v. Cilley*, 42 Atl. 47; *Roger v. Thomas*, 1 B. Mon. 930; *Taylor v. Cox*, 153 Ill. 220-231; *Mayo v. Jones*, 78 N. C. 402; *Comstock v. Society*, 8 Conn. 254; Sec. 1080, Code of Civil Procedure, as amended by Act of March 1, 1897, Laws of 1897, page 241; *McCutcheon v. Loggins* (Ala.), 19 So. 810; *Woodruff v. Hundley* (Ala.), 32 So. 570; *Jamison v. Jamison* (Del.), 3 Houst. 112; *Rich v. Lemmons* (D. C.), 15 App. Ct. 507; *Potts v. House*, 6 Ga. 324; *Thompson v. Bennett*, 194 Ill. 57; *Morell v. Morell*, 157 Ind. 179; *Crowninshield v. Crowninshield*, 67 Mass. 524; *Kempsey v. McGinniss*, 21 Mich. 147; *Ankin v. Weckerly*, 19 Mich. 502; *Harvey v. Heirs of Sullins*, 56 Mo. 373; *Boardman v. Woodman*, 47 N. H. 120; *Syne v. Boughton*, 85 N. C. 367; *Brown v. Griffith*, 11 Ohio St. 329; *Banning v. Banning*, 12 Ohio St. 437; *Runyan v. Price*, 15 Ohio St. 1; *Nicols v. Kershner*, 20 W. Va. 253; *Kerr v. Lunsford*, 31 W. Va. 659, S. C. 8, S. E. 493; *Kaine v. Trustees*, 5 N. W. 838; *Aultman v. Falkum*, 47 Minn. 414; *Carpenter v. First Nat'l Bank*, 199 Ill. 352; *Bradley v. Brady* (Ill.), 50 N. E. 124.)

The denial of the right of opening and closing a case to the jury constitutes reversible error. (*Tobin v. Jenkins*, 29 Ark. 151; *Mann v. Scott*, 32 Ark. 593; *Manseur v. Implement Co.*, 61 Ark. 627; *Royce v. Gazan*, 76 Ga. 79; *Sohn v. Jervis*, 101 Ind. 573; *Peed et al. v. Brennan*, 89 Ind. 252; *Crabtree v. Atchison*, 93 Ky. 338; *Lucas v. Hunt*, 91 Ky. 279; *Wright's Admr. v. N. W. etc. Ins. Co.*, 91 Ky. 208; *Abot v. Sugura*, 5 Martin, N. S. 73; *Johnson v. Josephs*, 75 Me. 544; *Edelen*

The petitioner may not have the benefit of the testimony of two witnesses to the facts that at the time of the execution of the will the testator subscribed the same in their presence, and declared it to be his last will and testament, without having such witnesses subject to be discredited or impeached. If this was not so, and the appellant's contention prevailed, no contest could be successfully waged against a will offered under such circumstances, for it would be practically impossible to disprove by other evidence the facts, or at least some of the facts, set forth in the attestation clause, or necessary to the due execution of the will; and, if not disproved, then the facts would stand as actually proved by the testimony of two witnesses not only entitled to full credit, but who cannot be impeached. (Section 3120, Code of Civil Procedure.) "The subscribing witnesses are subject to the same rules as to contradiction and impeachment as other witnesses." (Abbott's Trial Ev. (2d Ed.) 142.)

4. Complaint is also made that the court erred in admitting evidence of statements made by George H. Kelley to Henry G. Rickerts, then clerk of the district court. Before making this proof, the contestants had called the petitioner, Caroline V. Kelley, who testified that in all that was done by her husband, George H. Kelley, with reference to this estate, he was acting for her, and as her agent. Evidence had also been introduced of the transfer of a large portion of the property belonging to the estate by the petitioner to her husband, and of the efforts required to secure its reconveyance to the estate. As further evidence of the collusion and conspiracy charged, the contestants called Rickerts, who testified that, while the estate was in course of administration, he had received a communication from the husband of the contestant Farleigh, making inquiry with reference to the property left by Allport; that George H. Kelley came to him, and asked that he (Kelley) be permitted to answer the letter, and, upon a refusal of that request, asked Rickerts to say to Farleigh that the property consisted principally of real estate in the town of Basin, and was not very valuable. The objection interposed to this testimony was that it was in-

competent, immaterial and irrelevant. Upon the issue of a conspiracy to deprive these contestants of participating in the Allport estate, this evidence, as well as the letter written by the petitioner to Farleigh, telling him that Allport's estate had been settled, and the property left to her, was relevant and properly admitted—the declarations of George H. Kelley, as of a co-conspirator, or as the petitioner's agent; and those contained in the letter of the petitioner, as circumstances tending to prove such conspiracy.

5. Upon the trial the petitioner sought to prove by the witness Nichols that in May, 1899, the subscribing witness Geigerich had come to his office and handed to him the will in controversy, at the same time explaining the circumstances under which he had held possession of the document from the time of its alleged execution. The substance of Geigerich's statement to Nichols was that in October, 1895, Allport had executed the will, and gone with Geigerich to the office of the Butte Hardware Company to leave the instrument with one Kirby; that Kirby was not in, and Allport then handed it to Geigerich and asked him to deliver it to Kirby; that he (Geigerich) put the will away, and forgot about it until May, 1899, when he went to get a paper from a box in which he kept valuable papers, and discovered the will and brought it to Nichols. The offer to prove these declarations by the witness Nichols was excluded.

As we have heretofore seen, Geigerich was, to all intents and purposes, a witness in court, testifying under oath that the facts recited in the attestation clause actually occurred as therein set forth, and the reason for the rule which now excludes these declarations made by him to Nichols is that his declarations not made under oath cannot strengthen the testimony which he has given under oath. The issue involved was the genuineness of the alleged will, and to permit declarations of the absent subscribing witness in support of the validity of the will to be received in evidence for any purpose whatever would be to reverse the rule of evidence which has long ago become well settled—that extrajudicial declarations, not under oath, corrob-

rating testimony given in court, cannot be received. Whatever exceptions there may be to this rule have no application to the facts of this case.

The declarations of Geigerich were hearsay, and notably so are his declarations of declarations made to him by Allport. But it is contended that they should have been received as a part of the *res gestae*. They were made nearly four years after the alleged will purports to have been executed, and cannot, therefore, be said to characterize or explain the principal fact, viz., the execution of the will. As to that, they are narrations of a past transaction, and, as such, inadmissible.

But it is contended that they characterize and tend to explain the possession of the will, and for that purpose, at least, were admissible. The evidence was offered *en masse*—the offer was an entirety; and along with the declarations of Geigerich, explaining his possession, were the declarations made to him by Allport, and these, as offered, were incompetent under any phase of the case. So long, then, as the offer included evidence incompetent, coupled with that which may have been competent, the court committed no error in excluding the offer in its entirety. It was not the duty of the court to separate the competent from the incompetent matter, and admit the one and exclude the other. It properly passed upon the offer as made, and was not required to do for counsel that which he should have done for himself. (*Yoder v. Reynolds*, 28 Mont. 183, 72 Pac. 417; *Clark v. Ryan*, 95 Ala. 406, 11 South. 22; *First National Bank v. North*, 2 S. D. 480, 51 N. W. 96; *Thompson on Trials*, 678.)

6. Complaint is made that the court excluded the testimony of James T. Finlen. By this witness it was sought to show that, some time prior to the date of the trial, Finlen met Geigerich, who said he was going to leave Montana; that one Heinze had given him money with which to leave. This testimony was excluded, and the petitioner then offered to prove that the contestants had contracted with Heinze to sell to him whatever in-

terests they acquired in the Minnie Healy mine from Allport's estate. This offered testimony was also excluded.

We cannot conceive of any theory of the case upon which this testimony would be competent or material. It is idle to urge now that at least it tended to account for the absence of the subscribing witness Geigerich, as required by Section 2343 above. It was offered at the last stage of the trial, long after proof sufficient to satisfy the court as to the absence of the subscribing witnesses had been made, and their handwriting identified. The evidence was incompetent and immaterial, and was properly excluded.

We have examined the other errors assigned, and find no merit in them. The order overruling petitioner's motion for a new trial is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY: I concur.

MR. JUSTICE MILBURN: I concur, although I do not agree with MR. JUSTICE HOLLOWAY in all that is said in Sections 5 and 6 of the opinion.

WILSON, APPELLANT, v. PICKERING ET AL.,
RESPONDENTS.

(No. 1,595.)

(Submitted May 29, 1903. Decided June 22, 1903.)

Mortgages — Discharge—Renewal of Note—Effect — Limitations—Amendment of Statute — Retroactive Effect—Code Provisions.

1. A note secured by mortgage fell due June 11, 1886, and by the statute in force at that time action thereon would be outlawed in six years. Act

28	435
30	430
28	435
31	103

- 1889 (Sess. Laws 1889, p. 172) extended the period within which actions might be brought on written instruments to eight years, but expressly provided that the Act should not affect causes of action accrued prior to its passage. Code of Civil Procedure, Section 557, provides that the limitations prescribed therein shall not apply to causes of action which have become barred by existing statutes. *Held*, that the act of 1889 and the limitations prescribed in the Code had no application to the note in suit, but it was governed by the law in force at its maturity.
2. Civil Code, Section 3842, providing that a mortgage can be created, renewed, or extended only by writing with the formalities required in the case of a grant of real property, since it did not take effect until July 1, 1895, and since by Section 4651 no part of the Civil Code is retroactive unless expressly so declared, has no application to a mortgage renewed by extension of the note which it secured in 1890.
 3. The statute, if retroactive, would have been an unconstitutional impairment of the validity of the contract of renewal.
 4. A mortgage secures a debt, and not the evidence thereof, and no change in the form of the evidence or renewal thereof can operate to discharge the mortgage, in the absence of an express agreement or a plain manifestation of intention that it shall do so.
 5. The maker of a note secured by a mortgage, who renews the note, has the burden of proving that it was the intention of the parties that such renewal should not extend the mortgage.
 6. The maker of a note executed a mortgage to secure it. After maturity of the note, it was renewed. After the maturity of the renewal note, it was again renewed, and a mortgage was given by the maker on other land than that covered in the first mortgage. The maker, at the time of executing the second mortgage, was requested to execute a new mortgage covering the property described in the first, but this he declined to do, requesting, however, that the mortgagor bring suit to foreclose the first mortgage. *Held*, insufficient to overcome, as a matter of law, the presumption that the renewal of the note extended the first mortgage.

Appeal from District Court, Broadwater County; F. K. Armstrong, Judge.

ACTION by E. T. Wilson, as receiver of the First National Bank of Helena, against John G. Pickering and others. From a judgment granting insufficient relief, plaintiff appeals. Reversed.

STATEMENT OF THE CASE BY THE COMMISSIONER PREPARING THE OPINION.

This case was tried on an agreed statement of facts, from which it appears that on December 11, 1885, defendant John G. Pickering executed and delivered to the First National Bank of Helena his promissory note for the sum of \$9,902.06, due six months after date, with interest at the rate of $1\frac{1}{4}$ per cent.

per month after maturity until paid. At the same time the defendant John G. Pickering and Hannah Pickering, his wife, executed and delivered to the bank their certain mortgage on the real estate therein described as "additional security to secure the payment of \$3,000" of this note. On December 20, 1886, defendant John G. Pickering executed and delivered to said bank his promissory note for the sum of \$10,068.59, due in one year, with interest at the rate of $1\frac{1}{4}$ per cent. per month from date until paid. On January 20, 1888, defendant John G. Pickering executed and delivered to said bank his promissory note for the sum of \$1,510.20, due in one year, with interest at the rate of $1\frac{1}{4}$ per cent. per month after maturity until paid. At the date of the last-named note the defendants Pickering (and his wife) executed to the bank a mortgage on certain other real estate, conditioned for the payment of the last two named notes. At the time this last mortgage was executed, defendants were asked by the bank to execute a new mortgage covering the property described in the first mortgage to secure the \$3,000 included in the renewal indebtedness. This the defendants declined to do, and the defendant John G. Pickering then told the bank to commence foreclosure proceedings on the mortgage executed December 11, 1885. On February 8, 1890, the defendant John G. Pickering, without the knowledge or consent of the defendant Hannah Pickering, executed and delivered to the bank his promissory note for the sum of \$13,509.58, due one year after date, with interest at the rate of one per cent. per month after date until paid. Subsequently, and on the 12th day of April, 1895, one T. H. Kleinschmidt and Mary M. Kleinschmidt, his wife, "with the consent and by and under the direction of the said John G. Pickering, and for the further and additional security for the payment of the last-named note, executed and delivered to the bank" a deed to certain real estate, the title to which said T. H. Kleinschmidt then held in trust for defendant John G. Pickering. Defendant John G. Pickering paid on the last-named note the sum of \$1,642.10 as principal, and the further sum of \$1,621.20 as interest. It further

appears that the original indebtedness of \$9,902.06 was, with the interest, carried along and included in the several notes subsequently executed, and that the \$3,000 to secure the payment of which the first mortgage was executed was included in and constituted a part of the sum due plaintiff at the time suit was commenced. On December 27, 1897, at the time this action was commenced, it was admitted that there was due plaintiff from defendant John G. Pickering the sum of \$11,867.48, with interest thereon at the rate of 12 per cent. per annum from February 7, 1891.

Plaintiff asked for judgment for this amount, that the deed from Kleinschmidt to the bank be declared a mortgage, and for the foreclosure of all the mortgages named in the complaint, and the sale of the premises therein described.

The defendants interposed the plea of the statute of limitations as to the mortgage executed December 11, 1885, and denied that it was the intention that the renewal of the notes should operate as a renewal of the former mortgage liens.

At the trial the court found plaintiff to be entitled to the relief demanded, except as to the foreclosure of the mortgage dated December 11, 1885, which was found to be barred by the statute of limitations. Judgment was entered in accordance with the findings, and from the judgment so entered plaintiff appeals.

Mr. C. B. Nolan, for Appellant.

Mr. C. H. Baldwin, and *Mr. J. H. Shober*, for Respondents.

MR. COMMISSIONER POORMAN prepared the opinion for the court.

1. The only question presented for consideration on this appeal is whether the court erred in holding that the mortgage dated December 11, 1885, was barred by the statutes of limitation at the time of the commencement of this suit. The period prescribed by the statute at the time the right of action accrued

on the note described in that mortgage was six years. This note fell due June 11, 1886, and the right of action thereon was barred June 11, 1892, unless extended by some means or agreement outside of the instrument itself.

The Act of 1889 (Session Laws 1889, p. 172) extended the period within which action might be brought on a written instrument to eight years, but expressly provided that the Act should not affect causes of action which had accrued prior to its passage. The right of action on this first note having accrued prior to that time, it was not affected by this Act; and, the statute of limitation having fully run, unless tolled, prior to the time when the Codes of 1895 took effect, the status of the case is not affected by the Codes. (First Div. Comp. St. 1887, Sec. 42; Sess. Laws 1889, p. 172; Code Civ. Proc. Secs. 512, 557, 3456; Political Code, Sec. 9; *Sherman v. Nason*, 25 Mont. 283, 64 Pac. 768; *Guiterman v. Wishon*, 21 Mont. 458, 54 Pac. 566.) The last case cited further decides that the statute of limitation does not confer a vested right, to that extent modifying the decision in *Gillette v. Hibbard*, 3 Mont. 417, by establishing the doctrine that limitation Acts affect the remedy and not the right.

2. Counsel for respondent contends that the provisions of Section 3842 of the Civil Code apply to this case. That section provides that a mortgage "can be created, renewed or extended only by writing, with the formalities required in the case of a grant of real property." This statute is direct and certain, and admits of but one interpretation. A mortgage lien since its approval cannot be created, renewed or extended in contravention of its provisions. (*Wells v. Harter*, 56 Cal. 342; *London & S. F. Bank v. Bandmann*, 120 Cal. 220, 52 Pac. 583, 65 Am. St. Rep. 179.) This statute, however, did not take effect or become law until July 1, 1895, while the last renewal of the note in the case before us was executed February 8, 1890. If at the last-named date the renewal of a note, as a matter of law, extended or renewed a mortgage lien given to secure the indebtedness evidenced by the former note, such extension or renewal

became and was, at the time of the enactment of Section 3842, *supra*, a valid, subsisting contract, and the legislature could not impair its obligation by an enactment subsequent to the execution of such contract. (Cooley, Const. Lim. (6th Ed.) 328.) And, if a renewal of the note did not toll the statute of limitation, the plaintiff's right of action was barred thereby June 11, 1892, six years from the date when the first note became due. In either event, the section above quoted can have no application to the facts of this case. No part of the Civil Code is retroactive unless expressly so declared. (Civil Code, Sec. 4651.)

3. A mortgage does not create an estate in real property. It is a mere security for the payment of a debt. It is an incident to that which it secures. (*Hull v. Diehl*, 21 Mont. 71, 52 Pac. 782.)

The general doctrine appears to be that a mortgage secures a debt or obligation, and not the evidence of it, and no change in the form of the evidence or time of payment can operate to discharge the mortgage. So long as the debt secured remains unpaid, the renewal of the evidence of the debt will not impair the lien of the mortgage. The mortgage is barred only when the debt is barred. (*Lent v. Morrill*, 25 Cal. 492; *Vick v. Smith*, 83 N. C. 80; *Kerr v. Lydecker*, 51 Ohio St. 240, 37 N. E. 267, 23 L. R. A. 842; 15 Am. & Eng. Ency. Law (1st Ed.), 869; *Balch v. Arnold*, 9 Wyo. on page 36, 59 Pac. on page 438; *Crawford v. Hazelrigg*, 117 Ind. 69, 18 N. E. 603, 2 L. R. A. 139; *Dumell v. Terstegge*, 85 Am. Dec. 466.) To this latter case is appended a monographic note, containing a large collection of cases, and a full discussion of the above principles.

This general rule is modified to the extent that a court of equity will, on the presentation of a proper case, protect the intervening rights of third parties, and that the parties to the mortgage may, at the time of renewing the note, by express agreement, or a plain manifestation of a contrary intention, negative the presumption that the renewal of the note renews the mortgage lien; but the burden of proof is on the party asserting such proposition to show that it was not the intention that

such renewal of the note should renew or extend the mortgage. (*Brown v. Dunckel*, 46 Mich. 29, 8 N. W. 537; *Oliphint v. Eckerley*, 36 Ark. 69; *Vick v. Smith*, *supra*; *California Bank v. Brooks*, 126 Cal. 198, 59 Pac. 302; *Barber v. Babel*, 36 Cal. 11.)

4. At the time defendants executed the second mortgage, on January 20, 1888, to secure the payment of the note of that date, and of the note dated December 20, 1886, there was some discussion relative to the former mortgage, and the defendants were asked to give a new mortgage covering the same property described in the first mortgage. Mrs. Pickering refused to execute such new mortgage, and John G. Pickering refused to execute the same for the reason that his wife would not join him; but at the same time he requested the plaintiff to bring suit to foreclose this first mortgage. The facts presented in the agreed statement are not of themselves sufficient as a matter of law to repel the presumption that it was the intention of the parties that the execution of the new note and the new mortgage on other property should extend the lien of the former mortgage.

No question is raised with reference to the inchoate interest of the wife in the trust estate under the deed from the railroad company to Kleinschmidt. We therefore do not discuss that question.

On a consideration of the whole case, we are of the opinion that the judgment appealed from should be reversed, and the cause remanded, with direction to the district court to grant a new trial.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded for a new trial.

28	442
80	35

28	442
34	486

28	442
35	421
36	416

28	442
139	343

WRIGHT ET AL., APPELLANTS, v. MATHEWS, RESPONDENT.

(No. 1,604.)

(Submitted June 16, 1903. Decided June 22, 1903.)

New Trial—Settling Statement—Presentation to Judge—Expiration of Time—Effect.

1. Under Code of Civil Procedure, Section 1173, providing that, if the amendments to the statement or motion for a new trial prepared by the adverse party are not adopted, the proposed statement and amendments shall, within ten days thereafter, be presented by the moving party to the judge, or delivered to the clerk for the judge, the court must disregard, on appeal, the statement and all questions sought to be presented thereby, when the moving party has failed to comply with such requirement.
2. Where the court's order overruling a motion for a new trial does not indicate the particular ground on which it was made, every legitimate intendment will be indulged to support it.
3. Where the statement on motion for new trial and the defendant's proposed amendments were not presented to the judge within the ten days allowed by Code of Civil Procedure, Section 1173, it was proper to settle the same, and deny the motion for new trial.

Appeal from District Court, Fergus County; Dudley Du Bose, Judge.

ACTION by Frank E. Wright and others against Royal B. Mathews. From a judgment in favor of defendant, and an order denying their motion for a new trial, plaintiffs appeal. Affirmed.

Mr. James Donovan, for Appellants.

Messrs. Cort & Worden, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This was an adverse suit instituted in the district court of Fergus county, Montana, pursuant to Section 2326 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p.

1430), to determine the relative rights of the parties to certain mineral lands covered by conflicting claims. Upon the pleadings issues were joined, and the cause tried to the court and a jury. At the close of plaintiffs' case, upon motion of the defendant, the court granted a nonsuit, and entered a judgment in favor of the defendant for costs, from which judgment and an order denying their motion for a new trial the plaintiffs appeal.

The respondent insists that the motion for new trial was properly denied, for the reason that the proposed statement on motion for new trial and the amendments offered thereto were not presented to the judge for settlement, or left with the clerk for the judge, within the time allowed by law or the order of the court. The record discloses that a decision was rendered in the cause on the 7th day of September, 1899, and on that day the plaintiffs were granted thirty days in addition to the time allowed by law to prepare, serve and file their statement on motion for new trial. The statement was served on defendant on October 9th, and on October 17th defendant prepared and served upon the plaintiffs his amendments thereto. Nothing further was done until October 30th, when the proposed statement, with the amendments, were filed with the district clerk, and on October 31st the plaintiffs notified the defendant that they would not accept his proposed amendments. On November 11th plaintiffs gave notice that they would call the matter up for settlement on November 16th. The defendant thereupon filed and served written objection to the settlement of the proposed statement upon the ground that such statement and amendments offered thereto were not presented by the moving parties to the judge, or delivered to the clerk of the court for the judge, within ten days after the date upon which the amendments were served upon them. This objection was by the court considered and overruled, but incorporated in and made part of the statement, and such statement was thereupon settled. On March 24, 1900, the court overruled plaintiffs' motion for a new trial.

Section 1173 of the Code of Civil Procedure provides: "Sec. 1173. * * * (3) If the motion is to be made upon a state-

ment of the case, the moving party must, within ten days after service of the notice, or such further time as the court in which the action is pending or the judge thereof may allow, prepare a draft of the statement and serve the same, or a copy thereof, upon the adverse party. If such proposed statement be not agreed to by the adverse party, he must, within ten days thereafter, prepare amendments thereto and serve the same, or a copy thereof, upon the moving party. If the amendments be * * * not adopted, the proposed statement and amendments shall, within ten days thereafter, be presented by the moving party to the judge, upon five days' notice to the adverse party, or delivered to the clerk of the court for the judge." The record, then, discloses that the plaintiffs did not comply with the requirements of this section, in this: that they did not, within ten days after October 17th, present the proposed statement and amendments to the judge, or leave them with the clerk for the judge. "A motion for a new trial is a statutory remedy, and can only be invoked in the manner, within the time, and upon the grounds provided for in the statutes." (*Ogle v. Potter*, 24 Mont. 501, 62 Pac. 920.)

The question raised here is analogous to one where the statement is not served within the time provided by law or the order of the court, and it has become the settled doctrine in this state that a disregard by the moving party of the plain requirements of Section 1173, *supra*, will defeat his right to have the statement considered for any purpose.

The order of the district court overruling the motion for a new trial does not indicate the particular ground upon which it was made, and it is not necessary that it should, for every legitimate intendment will be indulged in favor of the order. If it can be supported for any reason, it will be done. (*Beach v. Spokane R. & W. Co.*, 25 Mont. 367, 65 Pac. 106.)

When the statement and proposed amendments, with defendant's objection, were presented to the district judge, he could properly refuse to settle the statement, or he could settle the same, and deny the motion for a new trial. In this instance

he followed the latter course, and in so doing committed no error. (*Sweeney v. Great Falls & C. Ry. Co.*, 11 Mont. 34, 27 Pac. 347; *Power v. Lenoir*, 22 Mont. 169, 56 Pac. 106; *Beach v. Spokane R. & W. Co.*, *supra*; *Burns v. Napton*, 26 Mont. 360, 68 Pac. 17; *Stromberg-Mullins Co. v. Dist. Court*, 28 Mont. 123, 72 Pac. 412.)

This disposes of the appeal from the order overruling the motion for a new trial, for, under the circumstances presented by the record, "this court must disregard the statement and all questions sought to be presented thereby." (*Power v. Lenoir*, *supra*.)

There is in the record before us for consideration then only the judgment roll, and an examination of that discloses no error. The judgment and order appealed from are affirmed.

Affirmed.

STATE EX REL. WEINSTEIN CO., RELATOR, v. DISTRICT
COURT OF THE FIRST JUDICIAL DIS-
TRICT ET AL., RESPONDENTS.

(No. 1,949.)

(Submitted May 23, 1903. Decided June 29, 1903.)

Claim and Delivery—Parties—Substitution—Appealable Orders—Certiorari.

1. In an action in claim and delivery, the court, under Code of Civil Procedure, Section 588, cannot make an order substituting in place of the defendant a claimant of the property, on the application of the defendant who has no control over the property (because of its previous delivery to the sheriff), and no power to deliver it on the court's order.
2. In order that *certiorari* may lie, three requisites are indispensable, namely: excess of jurisdiction; absence of the right of appeal; and lack of any other plain, speedy, and adequate remedy.
3. Under Session Laws 1899, p. 135, amending Code of Civil Procedure, Section 1722, and providing for an appeal from a final judgment, an order substituting a claimant of property, on application of defendant in a claim and delivery action, in lieu of defendant, is not a final determination from which an appeal is allowable.

4. Under Code of Civil Procedure, Section 1742, providing that on appeal from a judgment the court may review any intermediate order or decision excepted to which involves the merits or necessarily affects the judgment, an intermediate order substituting a claimant of property for defendant in a claim and delivery action may be reviewed on appeal from the final judgment, on exception reserved, and hence *certiorari* will not lie to have the order annulled as in excess of jurisdiction.

ORIGINAL application for *certiorari* by the state, on the relation of the Weinstein Company, to the district court of the First judicial district and Hon. J. M. Clements, a judge thereof, to have an order annulled as in excess of jurisdiction. Dismissed.

Messrs. Nolan & Loeb, for Relator.

Messrs. McConnell & McConnell, for Respondents.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Certiorari to the district court of Lewis and Clarke county. On May 9, 1903, the relator brought an action in that court in claim and delivery against one Thomas Travis to recover the possession of certain dry goods, hardware and jewelry. The complaint is in the ordinary form, alleging title and right of possession in plaintiff. It further alleges "that the defendant became possessed of the said goods and chattels, and wrongfully detains the same from the plaintiff," and has refused to return them to the plaintiff, though demand has been made for them, to the damage of plaintiff in the sum of \$100. The prayer is for a return of the property, or for the sum of \$300 in case return cannot be had, and for \$100 damages. Upon the filing of the complaint, the relator, desiring to have the property delivered to it, made the affidavit required by the statute and delivered the same, with proper indorsement thereon, to the sheriff, accompanied by a good and sufficient undertaking in double the value of the property alleged in the complaint. Thereupon the sheriff took the property from the defendant. On May 13th, after notice to the relator, the plaintiff in the action, and to one

Paul A. Tomcheck, the defendant applied to the court for an order substituting the said Paul A. Tomcheck as defendant in the action in his stead, and discharging him from liability. The application was supported by an affidavit to the effect that the defendant neither had nor claimed an interest in the property, and that the said Tomcheck, without collusion on his part, had also made demand upon him for the property, claiming to be the owner of it. After argument by counsel for relator and the said Travis, counsel for the latter also representing Tomcheck, the court made an order discharging the defendant from liability to either claimant and substituting Tomcheck as defendant in the action. At the time the order was made the property was in the possession of the sheriff, and this fact appeared from the affidavit of Travis. This proceeding was thereupon instituted to have the order annulled as in excess of jurisdiction.

The defendant in this proceeding has interposed a motion to quash the writ, on the grounds that the district court had jurisdiction to make the order, and that the relator has a plain, speedy and adequate remedy by appeal.

1. Did the district court have jurisdiction to make the order? The application was made under Section 588 of the Code of Civil Procedure, which, so far as applicable to this case, declares:

"Sec. 588. A defendant against whom an action is pending upon a contract, or for specific personal property, may at any time before answer, upon affidavit that a person not a party to the action makes against him, and without any collusion with him, a demand upon such contract, or for such property, upon notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in court the amount claimed on the contract, or delivering the property, or its value, to such person as the court may direct; and the court may, in its discretion, make the order. * * *"

Whether the order shall be made is lodged in the sound discretion of the court having jurisdiction of the action. To move

this discretion, however, it is indispensably necessary that certain facts exist and are made to appear in the affidavit. These are: (1) That an action is pending and the applicant is the defendant; (2) that the person sought to be substituted is a stranger to the action; (3) that such third person has made a claim upon the defendant for the property or fund in controversy, without collusion with the defendant, which necessarily implies that the defendant has no interest in the property or fund; and (4) that the applicant is able and stands ready to pay into court the amount of the fund or to deliver the property or its value to such person as the court may direct. At the time the application was made it was not in the power of Travis to deliver the property under the order of the court; indeed, the order made is silent as to the disposition of the property for the time being, the court evidently entertaining the view that, as it was in the possession of the sheriff, it was not necessary to make any order with reference to it. In order to have the benefit of the statute, Travis should have availed himself of the privilege granted him under Section 849 of the Code of Civil Procedure, and regained possession from the sheriff, thus enabling the court, in making the order, to put the plaintiff in the action and the substituted defendant in the same relative positions in which the plaintiff and he himself were at the beginning of the action. When the order was made, the defendant had no control of the property. It was in the hands of the sheriff, ready to be delivered to the plaintiff in case the option granted by Section 849, *supra*, was not exercised by the defendant. The court could not make any order with reference to a disposition of it; in fact, it had no jurisdiction to make any order with reference to it, nor to control the disposition of it in any way, except to render a final judgment in regard to it at the conclusion of the action. Though the statute grants the right to the order upon a proper showing, the showing made must meet all of its substantial requirements; otherwise, the court has no power to make the order. (*Edgerton v. Ross*, 6 Abb. Prac. 190; *Vosburgh v. Huntington*, 15 Abb. Prac. 254; *Pelham*

H&d Elevating Co. v. Baggaley (City Ct. N. Y.), 12 N. Y. Supp. 219.) It must follow, therefore, that the order in question here was made in excess of jurisdiction.

2. Is the order appealable? If so, or if there is any other adequate remedy, *certiorari* will not lie to review it; for, in order that this remedy may avail, three requisites are indispensable, namely, excess of jurisdiction, absence of the right of appeal, and lack of any other plain, speedy and adequate remedy. (Section 1941, Code Civ. Proc.; *State ex rel. King v. Dist. Court*, 24 Mont. 494, 62 Pac. 820; *State ex rel. White-side v. District Court*, 24 Mont. 539, 63 Pac. 395.)

The defendant contends that the order is a final judgment, and is appealable under the provisions of Subdivision 1 of Section 1722, as amended by the Act of 1899 (Sess. Laws 1899, page 146). This contention rests upon the assumption that it is a final determination of the rights of the parties so far as concerns the relator and Travis. With this view we do not agree. The order has none of the essential characteristics of a final judgment. It is not to be executed by a writ or other process; nor is any act required of any of the parties by the doing of which he will be injured in the meantime, in the sense, at least, that he will be finally deprived of any substantial personal or property right, or suffer an invasion thereof, unless he can prosecute an appeal directly from the order itself. From this point of view it does not fall within the principle of the case of *State ex rel. Heinze v. District Court*, 28 Mont. 227, 72 Pac. 613, but is merely an interlocutory or intermediate order, and falls within the class of orders which may be reviewed upon appeal from the final judgment in the case, upon exception reserved, under Section 1742 of the Code of Civil Procedure; otherwise, this and all similar orders, incidentally determinative of some right of a party to an action, must be held to be final judgments, within the definition of that term as laid down in Section 1000 of the Code of Civil Procedure. Therefore no direct appeal lies under Section 1722, *supra*.

It remains to inquire whether there is any other adequate remedy. In our judgment there is. In case it turns out upon final judgment that the plaintiff has suffered a prejudice, or has been aggrieved by a failure to obtain all his rights in the premises, he may appeal from the final judgment, whereupon this court, having the order before it upon exception, may review it under Section 1742, *supra*. For the time being the result is, perhaps, inconvenience and delay, but not more than may be the result of any other intermediate order made during the progress of any case before a trial is finally reached on the merits. Nor does this case fall within the exception recognized by this court in *State ex rel. A. C. M. Co. v. Dist. Court*, 26 Mont. 396, 68 Pac. 570, 69 Pac. 103, *State ex rel. B. & M. C. C. & S. M. Co. v. Dist. Court*, 27 Mont. 441, 71 Pac. 602, and similar cases, in which interlocutory orders have been annulled by the writ of *certiorari*. In this class of cases, though the particular order may be reviewed upon appeal from the final judgment, such review is inadequate, for the reason that all the injury which the complaining party may suffer will have been done long before review can be reached upon appeal from the final judgment.

It follows that, though the order was in excess of jurisdiction, the remedy by appeal from the final judgment is inadequate, and the writ should have been denied. The writ is therefore quashed, and the proceeding dismissed.

Dismissed.

WETZSTEIN, APPELLANT, v. BOSTON & MONTANA
CONSOLIDATED COPPER & SILVER MIN-
ING COMPANY, RESPONDENT.

(No. 1,618.)

(Submitted June 19, 1903. Decided July 1, 1903.)

*Actions — Demurrer — Another Action Pending — Appeal—
Identity of Parties—Same Cause of Action.*

1. Where a complaint shows that a former action, between the same parties and for the same cause, is before the supreme court undetermined on appeal, a demurrer is properly sustained thereto.
2. The action is between the same parties when it appears from the complaint that the defendant in the action is the successor in interest of the defendant in a former action.
3. The action is for the same cause, if based on the same assertion of title as in a former action, though the plaintiff in the subsequent action prays for an injunction, the appointment of a receiver, and for an accounting, where he was entitled to such relief as to the injunction and receiver in the former action, and fails to state facts sufficient to constitute a cause of action for an accounting, by not averring a demand for an accounting and a denial thereof by defendant.

Appeal from District Court, Silver Bow County; John Lindsay, Judge.

ACTION by Adolph Wetzstein against the Boston & Montana Consolidated Copper & Silver Mining Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Messrs. McHatton & Colter, and Messrs. Toole & Bach, for Appellant.

The former action does not constitute any bar to or abatement of this action; until the final determination of the former action, the plaintiff had a right to institute and maintain this action. (Code of Civil Proc. Secs. 1895, 1893; *Murray v. Greene*, 64 Cal. 369; *Harris v. Barnhart*, 97 Cal. 546, 32 Pac. 589; *Naftzger v. Gregg*, 99 Cal. 83; *Brown v. Campbell*, 100 Cal. 636; *Estate of Blythe*, 99 Cal. 472; *Storey v. Storey &*

28	451
30	187
28	451
32	515
28	451
41	205

Isham Co., 100 Cal. 41; *Montana Mining Co. Ltd. v. St. Louis M. & S. Co.*, 58 Pac. 870.)

The plaintiff's position is that he is a cotenant with the defendant; that the defendant denies his title, and has ousted and excluded and still excludes him from the common property. At common law a tenant in common had the right to enter upon the whole and every part of the property. (*Carpenter v. Webster*, 27 Cal. 544-546; *Teris v. Hicks*, 38 Cal. 234-238; *Freeman on Cotenancy*, 87.) In all cases a tenant in common can sue his cotenant. (Section 586, Code Civil Procedure of Montana.) Under the Act of February 28, 1899, Laws of Montana, Sixth Session, page 134, the plaintiff has a right to maintain this action. Under the circumstances alleged in the complaint he is entitled thereunder to the relief prayed.

An action in equity for an accounting is a proper one. (11 Am. & Eng. Ency. Law, p. 1131, note 2; *Ward v. Ward*, 29 L. R. A. 449, note; *Gage v. Gage*, 28 L. R. A. 849; *Fitzgerald v. Clark*, 17 Mont. 100; *McCord v. Oakland Q. M. Co.*, 64 Cal. 134; *Clay v. Field*, 115 U. S. 260; *Stewart v. Stewart*, 63 N. W. 886; *A. C. M. Co. v. B. & B. Co.*, 17 Mont. 519.)

Messrs. Forbis & Evans, for Respondents.

Cited: 1 Ency. Pl. & Pr. pp. 750-752, and cases cited; *Van Fleet on Former Adjudication*, Secs. 1077, 1086; *Crane v. Larson*, 15 Pac. 326; *Holloway v. Holloway*, 103 Mo. 274; *Mantle v. Speculator Mining Co.*, 71 Pac. 665; 1 Ency. Pl. & Pr. pp. 763, 98; *Mullen v. Mullock*, 22 Kan. 598; *Colt v. Partridge*, 7 Met. 579; *Damon v. Denny*, 54 Conn. 253; Code of Civil Proc. Sec. 950; *French Bank Case*, 53 Cal. 553; *Magauran v. Tiffany*, 62 How. Pr. 251; *Perry v. Foster*, 62 How. Pr. 228; *Jolly v. Bryan*, 86 N. C. 457.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was commenced in the district court of Silver Bow county, Montana, to secure a decree establishing plaintiffs

title to an undivided one-fourth interest in the Comanche mining claim, to have the defendant declared to hold the same as trustee for the benefit of the plaintiff, to compel the conveyance of such interest to him, to secure the appointment of a receiver to work the property, an injunction to restrain defendant from converting to its own use ores taken from plaintiff's alleged one-fourth interest in the claim, and for an accounting by the defendant for ores extracted from the claim from the time it came into possession of the same. The complaint sets forth at length the history of the Comanche mining claim, and, among other things, alleges that it was located in 1879 by Turner and Upton; that Largey, Zenor and Bielenberg succeeded to Turner's interest; that Upton conveyed a one-fourth interest in the claim to Tong, and afterwards a one-fourth interest to H. L. Frank, who conveyed the same to this plaintiff; that, while Upton continued to own a one-fourth interest in the property, Tong, Largey, Zenor and Bielenberg wrongfully and fraudulently, and with intent to acquire for themselves the right to Upton's undivided one-fourth interest in the claim, made application for patent, and in said application fraudulently omitted and excluded Upton's name; that they received a patent, organized the Comanche Mining Company, and assumed to convey the entire property to such company, which had actual notice of plaintiff's alleged claim of interest therein; that this plaintiff in 1894 commenced an action in the district court of Silver Bow county against the Comanche Mining Company, Largey, Zenor, Bielenberg, Warren and Tong, to have them declared trustees of an undivided one-fourth interest in the property for his benefit, and to require a conveyance of such interest to him; that on the date of the commencement of such action plaintiff filed with the county clerk and recorder of Silver Bow county, where the property was located, a notice of *lis pendens*; that such action was tried on its merits, and a decree entered adjudging that this plaintiff had no right, title or interest in the property whatever; that from such decree and an order denying his motion for a new trial he appealed to the supreme court;

that such appeal was still pending undetermined in the supreme court at the date of the commencement of this action; that, in addition to the notice conveyed by the notice of *lis pendens*, this defendant had actual notice of the claim of this plaintiff, but, notwithstanding such notice, in 1896 it assumed to purchase from the Comanche Mining Company the entire property, and immediately thereafter went into possession and commenced to extract large quantities of ore from the same. To this complaint the defendant interposed a demurrer upon the following, among other, grounds: (2) That another action is pending between the same parties for the same cause; and (3) that the complaint does not state facts sufficient to constitute a cause of action. This demurrer was by the court sustained, and, the plaintiff declining to amend, judgment was entered in favor of defendant for its costs, from which this appeal is prosecuted.

Section 680 of the Code of Civil Procedure provides that a demurrer may be interposed to a complaint upon the following ground: "(3) That there is another action pending between the same parties for the same cause." In order to invoke successfully this ground of demurrer, it must appear from the face of the complaint (1) that another action is pending, (2) that it is between the same parties, and (3) that it is for the same cause.

1. Section 1895 of the Code of Civil Procedure provides that an action is pending from the commencement thereof until the final determination on appeal, or until the time for appeal has expired, unless the judgment has been sooner satisfied. It appears from the complaint that at the date of the commencement of this action the former action was before the supreme court undetermined on appeal, and was therefore then pending within the meaning of Subdivision 3 of Section 680, *supra*. This is the view taken of a like provision by the Supreme Court of California in *Fisk v. Atkinson*, 71 Cal. 452, 10 Pac. 374, 12 Pac. 498.

2. The plaintiff in each action is admittedly the same. It appears from the complaint that the defendant in this action

is the successor in interest of the defendants in the former action; that it purchased the property pending such litigation, and, in addition to the knowledge brought home to it by the notice of *lis pendens*, it had actual notice of plaintiff's claim of interest at the date it purchased the property, and this successive interest or relationship to the same right of property constituted this defendant a privy of the defendants in the former action. The very purpose of *lis pendens* is, and indeed the very purpose which the plaintiff must have had in filing such notice was, to bind any subsequent purchasers, by the decree which he might obtain in the action, to the same extent as though actually parties to the litigation; and the reason of the rule that the term "parties," as used in Subdivision 3 of Section 680, *supra*, includes privies, then becomes apparent, and this we understand the rule to be. (1 Cyc. 33; 21 Ency. Law (2d Ed.), 602; *Crane v. Larsen*, 15 Ore. 345, 15 Pac. 326; *Holloway v. Holloway*, 103 Mo. 274, 15 S. W. 536.) Applying this test, it is obvious that the parties to this and the former action are the same within the meaning of Section 680, above.

3. Was the former action for the same cause as the present one? That action was brought to have the defendants declared to hold an undivided one-fourth interest in the Comanche claim in trust for the plaintiff, and, primarily, the present action is brought for the same purpose and to secure the same result. The claim made by the plaintiff in each action is the same, based upon the same assertion of title, and none other. As incidents to this primary relief, and dependent absolutely upon this particular claim of title, the plaintiff in this action asks for an injunction, the appointment of a receiver, and an accounting. The general rule for determining the question now under consideration is, if in the former action a judgment had been obtained upon the merits, and that judgment had become final, it could be pleaded in bar of this action. (1 Cyc. 28; *Damon v. Denny*, 54 Conn. 253, 7 Atl. 409; *Mullen v. Mullock*, 22 Kan. 598.) Or, stated in other words, could the plaintiff in the former action have obtained all the relief which he al-

leges he is entitled to in the present action? If so, he will be required to exhaust his remedy in that action, and will not be permitted to harass or annoy the defendant by maintaining this one. There is reason for this rule; for, if the plaintiff failed in the former action and was declared to have no interest whatever in the property, then he could not maintain this action, and the decree in the former would be an absolute bar to this, for his claim of right is based upon the same alleged title in each instance. If he prevailed in the former action, the defendant in this one, having purchased with actual knowledge of his alleged claim, would be bound by such decree to the extent, at least, which it established the plaintiff's interest in the property and afforded him ancillary relief by way of injunction or the appointment of a receiver, and therefore, under such circumstances, this action to that extent would be entirely useless; for, if he is entitled to an injunction or the appointment of a receiver in this action, he was equally entitled to such relief in his former suit.

But it is contended that the plaintiff is entitled to an accounting by the defendant company for ores extracted since it came into possession of the property, and to that extent, at least, the causes of action are not the same. This gives rise to the inquiry: Does the complaint state facts sufficient to constitute a cause of action for an accounting? It is conceded that the defendant is the owner of an undivided three-fourths interest in the claim in controversy, and therefore no wrong can be imputed to its possession of the common property. In order to change the character of such occupation, the plaintiff must have been wrongfully denied participation in the fruits of the mining operations carried on to the extent of his interest. If he had received his alleged share of the proceeds no complaint could be made upon this branch of the case, or, if he knew or had the means of knowing just what such share actually amounted to, he would have no cause of action for an accounting; for the law does not assume to do for parties that which they may rightfully do for themselves, and particularly does not encourage needless controversies in the courts.

The gist of an action for an accounting is the inability of the plaintiff to procure the same himself, and the refusal of the defendant to render such accounting to him; and this suggests the rule, general in its application, though apparently seldom announced, that a demand by the plaintiff for an accounting and a denial thereof by the defendant are necessary prerequisites to be pleaded and proved, in order to maintain an action for an accounting. (1 Ency. Pl. & Pr. 98; *Jolly v. Bryan*, 86 N. C. 457; *Smith v. Lawrence*, 26 Conn. 468; *Southworth v. Smith*, 27 Conn. 355, 71 Am. Dec. 72; *Kennicott v. Leavitt*, 37 Ill. App. 435.) In the absence of an allegation of demand and refusal, we are of the opinion that the complaint does not state facts sufficient to constitute a cause of action for an accounting, and, as the plaintiff could have obtained in the former action all other relief which he claims for himself in this, we hold that at the date of the commencement of this action the former action was then pending between the same parties for the same cause, and in sustaining the demurrer the lower court committed no error. The judgment is affirmed.

Affirmed.

CORNELL ET AL., APPELLANTS, v. MATTHEWS ET AL.,
RESPONDENTS.

(No. 1,622.)

(Submitted June 19, 1903. Decided July 9, 1903.)

Appeal—Record—Certified Copies of Papers.

1. Under Code of Civil Procedure, Section 1738, declaring that, on an appeal from an order granting a new trial, the appellant must furnish the court with a copy of a notice of appeal, of the order appealed from, and of the papers designated in Section 1176, etc., the court can only consider "copies" of the papers referred to; and hence a record on appeal, composed of original papers withdrawn from the files of the district court, will not support an appeal.
2. The supreme court has no jurisdiction of an appeal unless the record on appeal conforms to the requirements of the statute.

Appeal from District Court, Lewis and Clarke County; S. H. McIntire, Judge.

ACTION by J. R. Cornell and another against Lyman A. Matthews and another. From an order granting a new trial, plaintiffs appeal. Appeal dismissed.

Mr. Albert I. Loeb, for Appellants.

Mr. T. J. Walsh, for Respondents.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought by plaintiffs for the purpose of perpetually enjoining defendants from obstructing or otherwise interfering with a right of way which plaintiffs claim to have over the lands of the defendants. The district court found for the plaintiffs, and directed the injunction to issue as prayed. The defendants thereupon moved for a new trial. From the order granting it the plaintiffs have appealed.

None of the questions submitted by appellants may be considered or decided, because of the condition of the record filed in this court. Besides a copy of the notice of appeal and the index, it consists only of the original bill of exceptions settled by the district court granting the order. This has embodied in it the original statement prepared by defendants and settled by the court in support of the motion. It thus appears that the entire record, with the exception of the notice and index, is made up of original papers which have been withdrawn from the files of the district court. Section 1736 of the Code of Civil Procedure provides that, "on an appeal from a final judgment, the appellant must furnish the court with a copy of the notice of appeal, of the judgment roll, and of any bill of exceptions or statement in the case" upon which he relies. Section 1738 declares that, on appeal from an order granting or refusing a new trial, the appellant must furnish the court with a copy of

the notice of appeal, of the order appealed from, and of the papers designated in Section 1176. This latter section enumerates the papers which shall constitute the record on appeal from an order granting or refusing a new trial. It is manifest from these provisions, when taken together with Sections 1739 and 1740, that the record presented to this court must consist of certified *copies*, instead of the original papers constituting the files of the district court. The reason underlying these provisions is also manifest. The records of the district court must remain permanently on file with the clerk, except when original exhibits which have been made a part of the record in that court may be certified to this court under the rule. (Rule VII.) Even in these cases such exhibits are required to remain permanently among the files of this court only when bound in the record. When not bound in the record, they may be withdrawn and returned to the files of the district court, where they belong. Everything else, however, becomes a part of the records of this court, and must remain in the custody of the clerk. Such being the case, only records properly certified up by copy can lawfully become and remain constituent parts of the records of this court; otherwise, important parts of the records of the various district courts throughout the state would become incorporated in the records of this court, and to this extent the character of those courts as courts of record would be destroyed.

From these considerations it follows that the record in this case is not such a one as that this court may consider or determine any question sought to be presented by it. It is of no consequence whether the files of the district court are incorporated in the record on appeal by the implied consent of parties or by permission of the judge of the district court, as seems to have been the case here. Furthermore, this court has no jurisdiction of the appeal, unless the requirements of these statutory provisions have been observed. Its appellate jurisdiction may be exercised only under limitations and regulations prescribed by law touching the time within which and the mode by which appeals may be taken. (Constitution, Article VIII, Sec. 3;

State ex rel. Whiteside v. District Court, 24 Mont. 539, 63 Pac. 395; *Finlen v. Heinze*, 27 Mont. 107, 69 Pac. 829; *Finlen v. Heinze*, 27 Mont. 123, 70 Pac. 517.) The provisions of the statute above referred to define the mode by which appeals may be effectually taken to this court, and are mandatory. (*Featherman v. Granite County*, 28 Mont. 462, 72 Pac. 972.)

The appeal must therefore be dismissed. It is so ordered. It is further ordered that the clerk of this court return to the clerk of the district court the bill of exceptions, after detaching therefrom the cover, the index, the copy of the notice of appeal, and the certificate.

Dismissed.

BECK ET AL., APPELLANTS, v. HOLLAND ET AL.,
RESPONDENTS.

(No. 1,627.)

(Submitted June 22, 1903. Decided July 9, 1903.)

Appeal—Record—Sufficiency.

A record on appeal, consisting only of a bill of exceptions, notice of appeal, and certificate of the clerk, and which does not purport to contain a certified copy of the judgment roll as such, part of the papers constituting which are contained in the bill of exceptions, the existence of others merely being recited therein, is insufficient to give the court jurisdiction.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

ACTION by J. F. Beck and others against John G. Holland and another. From a judgment for defendants, plaintiffs appeal. Dismissed.

Mr. B. S. Thresher, for Appellants.

Mr. Edwin M. Lamb, and *Mr. J. L. Templeman*, for Respondents.

MR. COMMISSIONER CLAYBERG prepared the opinion for the court.

The record in this case consists only of a bill of exceptions, notice of appeal, and certificate of the clerk, and does not purport to contain a certified copy of the judgment roll as such. The bill of exceptions contains copies of a portion of the papers constituting the judgment roll, and merely recites the existence of others. We have lately decided that such a record is insufficient to give the court jurisdiction. (*Featherman v. Granite County*, 28 Mont. 462, 72 Pac. 972.)

We therefore are of the opinion that the appeal should be dismissed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the appeal is dismissed.

MR. JUSTICE HOLLOWAY: The record recites that from the date of the commencement of this action to the date of judgment a number of changes of parties had been made by the court; but the record nowhere contains copies of the orders relating to such changes. Section 1196, Code of Civil Procedure, specifies what papers shall constitute the judgment roll, and, among others, are copies of orders relating to change of parties. In the absence of these, the judgment roll is not complete, or, in other words, no judgment roll is before this court, and we have no jurisdiction to consider the appeal on its merits. (*Stanton v. Lewis*, 28 Mont. 267, 72 Pac. 658.) For this reason I concur in a dismissal.

Rehearing granted October 9, 1903.

FEATHERMAN ET AL., RESPONDENTS, v. GRANITE
COUNTY, APPELLANT.

(No. 1,605.)

(Submitted June 17, 1903. Decided July 9, 1903.)

*Appeals—Jurisdiction of Supreme Court—Statutory Regula-
tions—Record on Appeal — Judgment Roll—Certificate—
Sufficiency—Bill of Exceptions.*

1. Under Constitution, Article VIII, Sections 2, 3, 15, the supreme court has jurisdiction to entertain appeals or writs of error only when the statutory requirements have been complied with.
2. Under Code of Civil Procedure, Section 1736, providing that on appeal from a final judgment, appellant must furnish the court with a copy of the notice of appeal, judgment roll, and bill of exceptions, or statement in the case, the presence of a copy of the judgment roll in the record is jurisdictional, and without it the court cannot consider any question on the appeal.
3. Under Code of Civil Procedure, Section 1739, providing that the copies of papers to be furnished on appeal must be certified to be correct by the clerk or attorneys, on appeal from a final judgment it must be certified that the record contains a true copy of the judgment roll. A certificate which only states that the transcript contains true copies of certain designated papers contained in the judgment roll is insufficient.
4. The requirement of Code of Civil Procedure, Section 1736, providing that, on appeal from a final judgment, appellant must furnish the court with a copy of the notice of appeal, judgment roll, and bill of exceptions, or statement in the case, are not complied with by simply inserting in the record a copy of the bill of exceptions, or statement, even though it includes copies of all papers constituting the judgment roll.

*Appeal from District Court, Granite County; Welling Nap-
ton, Judge.*

ACTION by John A. Featherman and James B. Featherman against Granite County. From a judgment for plaintiffs, defendant appeals. Dismissed.

Mr. H. W. Rodgers, and Messrs. Dufree & Brown, for Ap-
pellant.

Messrs. Toole & Bach, for Respondents.

MR. COMMISSIONER CLAYBERG prepared the opinion for the court.

Appeal from a final judgment. The record consists only of a statement on motion for a new trial, the journal entry overruling such motion, the notice of appeal from the judgment, and the certificate of the clerk of the court. Incorporated in this statement are copies of the pleadings, the decision of the court, and the judgment appealed from. It does not purport to contain any separate transcript or copy of the judgment roll in the case.

Respondents suggest that the record does not contain the judgment roll properly certified, and this question must be first considered.

The appellate jurisdiction of the supreme court is given by the Constitution in the following language: "The supreme court, except as otherwise provided in this Constitution, shall have appellate jurisdiction only, which shall be coextensive with the state, and shall have a general supervisory control over all inferior courts, under such regulations and limitations as may be prescribed by law." (Article VIII, Sec. 2.) "The appellate jurisdiction of the supreme court shall extend to all cases at law and in equity, subject, however, to such limitations and regulations as may be prescribed by law." (Article VIII, Sec. 3.) "Writs of error and appeals shall be allowed from the decisions of the said district courts to the supreme court under such regulations as may be prescribed by law." (Article VIII, Sec. 15.) The limitations which "may be prescribed by law," mentioned in Section 3, *supra*, refer to statutes in existence at the time of the adoption of the Constitution, and adopted by the schedule which is a part thereof, or statutes thereafter to be passed, specifying under what limitations appeals may be taken. The regulations which "may be prescribed by law," mentioned in each of these sections, also refer to statutes adopted or to be enacted, as above stated, providing the methods by which appeals and proceedings upon writs of error may be per-

fect. These clauses have been considered by the court in the following cases: *State ex rel. Whiteside v. First Judicial District Court*, 24 Mont. 539, 63 Pac. 395; *Finlen v. Heinze*, 27 Mont. 107, 69 Pac. 829; *Finlen v. Heinze*, 27 Mont. 123, 70 Pac. 517.

It is, therefore, clear that, unless an appeal or writ of error is within the limitations prescribed in these statutes and perfected according to the regulations provided thereby, the court has no jurisdiction to entertain it. Therefore, to determine whether it has jurisdiction of an appeal or writ of error in any case, we must consider and determine at least two things: (1) Whether the appeal or writ of error is within the limitations prescribed by the statute; (2) whether the appeal or writ of error is perfected in accordance with the regulations provided by the statutes; and, possibly, a third, whether, in special cases where no specific method is provided by the statute for the perfection of an appeal, the court will entertain it, under its constitutional jurisdiction, and apply the provisions of statutes providing methods for perfecting appeals in analogous cases, or fix a method by order or rule of court.

There is no doubt but that an appeal from a final judgment is provided for by the Constitution. It is also clear that this is not a special case or proceeding, from which an appeal is given by the Constitution, and no method provided by statute for its perfection. Therefore we need only consider the proposition whether, in taking the appeal in this case, the regulations prescribed by law have been followed. The methods of taking appeals, being statutory and jurisdictional, must be followed, in order to give this court jurisdiction to entertain the appeal. (*Washoe Copper Co. v. Hickey*, 23 Mont. 319, 58 Pac. 866; *Creek v. Bozeman Water Works Co.*, 22 Mont. 327, 56 Pac. 362.)

An examination of the record in this case discloses the following facts:

1. The certificate by which the record is authenticated is in the following form: "I, A. A. Fairbain, clerk of the district

court of the Third judicial district of the state of Montana, in and for the county of Granite, hereby certify that the foregoing transcript contains full, true and correct copies of the following papers in cause No. 377, entitled 'John A. Featherman and Jas. B. Featherman v. Granite County, Montana,' viz.: Statement on motion for new trial; bill of exceptions; amended complaint; answer to amended complaint; certificate of stenographer; decision of court; judgment; notice of intention to move for new trial; stipulation; journal entry; notice of appeal—as the same appear of record in my office." As above stated, all papers specified in this certificate, except the journal entry and notice of appeal, are included in the statement on motion for a new trial, and not otherwise inserted. This certificate does not assume to certify that the record transmitted contains a copy of the judgment roll as such. So far as the authentication is concerned, there may have been other papers on file or of record, which are necessarily parts of the judgment roll, under the provisions of Section 1196, Code of Civil Procedure. Under these circumstances, is the court to indulge the presumption that there are no other such papers?

Section 1736 provides that, "on an appeal from a final judgment, the appellant must furnish the court with a copy of the notice of appeal, of the judgment roll, and of any bill of exceptions or statement in the case, upon which the appellant relies. Any statement used on a motion for a new trial may be used on appeal from a final judgment equally as upon appeal from the order granting or refusing a new trial." The presence of a copy of the judgment roll in the record is jurisdictional. If it does not appear, the court cannot consider any question upon the appeal. Shall we presume jurisdiction exists, or must it be shown? If the existence of any jurisdictional fact is to be presumed, why might not the same presumption, based upon the same reasoning, be extended to all jurisdictional facts? At what point can the court "draw the line?" The judgment roll provided for by the statute, while consisting of several distinct and separate papers, is an *entity*; and it is a certified copy of

this entity which Section 1736 requires as a part of the record on appeal. There is no method by which the court can satisfy itself that this entity is included in the record, save by the certificate of the clerk or attorneys attached thereto.

We recognize the proposition that a clerk's decision as to what papers constitute the judgment roll would not be binding upon the court. The statute designates what it shall contain. The requirements of Section 1739, Code of Civil Procedure, must be complied with by the clerk or attorneys, who must certify that the record contains a true copy of the judgment roll. If the record is in fact deficient through error of the clerk, any party to the appeal may suggest diminution thereof, and have it corrected.

The rule is well settled that, where the statute requires the entire record of the court below to be certified to the supreme court, a certificate which only states that the transcript contains true copies of certain designated papers is insufficient. (*Westbrook v. Schmaus*, 51 Kan. 214, 32 Pac. 892; *Byers v. Leavenworth Lodge*, 54 Kan. 321, 38 Pac. 302; *Cook v. Challis*, 55 Kan. 363, 40 Pac. 643; *Tod v. Gurney Ranch Co.* (Kan. App.) 53 Pac. 789; *Barger v. Sample* (Kan. Sup.) 64 Pac. 1026; *Scott v. Brown*, 9 Kan. App. 870, 61 Pac. 460.)

We therefore conclude that the certificate attached to the record herein is insufficient to show that the record contains a true copy of the judgment roll.

2. As above shown, this record does not assume to contain a transcript of the judgment roll, otherwise than by copies of certain parts thereof, included and embodied in the statement on motion for a new trial. We do not think this is a sufficient certification. The judgment roll consists of such papers as constitute the record of the case in the court below. It should contain only such papers as the statute makes a part of that record.

The purpose of a bill of exceptions or statement on motion for a new trial is to enable the party who obtains a settlement of the same to make something a part of the record of the court which was not of record before. When we consider this pur-

pose, we can but conclude that the papers which form the judgment roll, being already records of the court, have no place in a statement on motion for a new trial or bill of exceptions. No purpose can be served by their insertion, and, when made, they amount to nothing more than mere recitals that such papers and orders exist.

As before suggested, Section 1736 provides that the record on appeal from a final judgment must contain a copy of the notice of appeal, of the judgment roll, *and* of any bill of exceptions or statement in the case upon which the appellant relies. If it must contain a copy of the judgment roll *and* a copy of any bill of exceptions or statement in the case, its language cannot be satisfied by simply inserting in the record a copy of the bill of exceptions or statement in the case, even though it includes copies of all papers which constitute the judgment roll. It is impossible, when the statute requires two separate matters to be placed in the record and certified, that its requirements can be satisfied with the furnishing of one only, even though that one may include all the papers comprised in the other. The Constitution having provided that appeals may be taken under such "regulations as may be prescribed by law," and the law having prescribed regulations for such purpose, these regulations, for the purposes of construction, must be treated as though set forth in, and made a part of, the Constitution. They therefore become "mandatory and prohibitory."

A copy of the judgment roll cannot be properly furnished to the supreme court in the statement or bill of exceptions. (*Moody v. Nichol*, 26 Miss. 109; *Smith v. Calcote*, 41 Miss. 656; *Byrne v. Cummings*, 41 Miss. 192; *Tunno v. International, etc. Ry. Co.*, 34 Fla. 300, 16 South. 180; *Van Horne v. Henderson*, 37 Fla. 354, 19 South. 659; *Curran v. Foley*, 67 Ill. App. 543; *New Orleans, etc. R. R. Co. v. Albritton*, 75 Am. Dec. 98; *Northrop v. Jenison*, 12 Colo. App. 523, 56 Pac. 187.)

It therefore appears that the "regulations prescribed by law," whereby an appeal may be brought to the supreme court, have

not been complied with, and that the court is without jurisdiction to entertain the appeal or consider the case.

We advise that the appeal be dismissed.

PER CURIAM.—For the reasons stated in the foregoing opinion, the appeal is dismissed. It is not, however, without some reluctance that the court feels compelled to announce the conclusion therein stated, because an examination of the records on appeal now filed in this court discloses that many attorneys have fallen into the same error as appellant in this case. The point having been made in the argument, and directly presented, it became the duty of the court to consider and decide it. The conclusion of the commissioners is clearly in accord with the provisions of the statute, and the cases construing them. But this conclusion need not necessarily work injustice in any case to be hereafter submitted, for the reason that counsel may, upon timely application to the court, and upon suggestion of diminution, amend their records, so that the jurisdiction of the court will properly attach.

MR. JUSTICE HOLLOWAY: For the reason that it does not appear that the record contains a copy of the judgment roll, I concur in the order of dismissal.

CLARK, RESPONDENT, v. AMERICAN DEVELOPING &
MINING COMPANY, APPELLANT.

(No. 1,606.)

(Submitted June 17, 1903. Decided July 14, 1903.)

*Mining Property—Sale—Optional Contracts — Rescission—
Refunding Payments.*

Defendant gave plaintiff an exclusive option on certain mining property and placed him in possession. An installment becoming due, plaintiff expressed

dissatisfaction, and requested an extension of thirty days on the installment, which was refused, and demand made for adherence to the contract. Defendant insisted on the contract, and indicated no intention of abandoning it. After telegraphic communications relating to the transaction, defendant demanded the deeds which had been placed in escrow; and received from plaintiff possession of the properties, terminating the contract. Plaintiff claimed a return of installments previously paid, on the ground that defendant had abandoned the contract, which contained no provision relative to the retention of installments, and of which time was the essence. *Held*, that plaintiff was not entitled to a return of the installments, as it did not affirmatively appear, from the contract of sale or in the agreement to rescind, that the purchaser was to have payments made refunded.

Appeal from District Court, Lewis and Clarke County; H. C. Smith, Judge.

ACTION by William J. Clark against the American Developing & Mining Company. From a judgment in favor of plaintiff, and an order denying a motion for a new trial, defendant appeals. Reversed.

Mr. F. W. Bacorn, and Messrs. Forbis & Evans, for Appellant.

Courts will look to the acts of the parties and to the surrounding circumstances to see which kind of a rescission they have intended. (*Hayes v. City of Nashville*, 80 Fed. 641; *Mayor v. Refrigerating Co.*, 40 N. E. 771; *Winton v. Spring*, 18 Cal. 451.)

The rescission or modification of a contract, being in effect the substitution of one contract for another, requires the same meeting of minds as did the formation of the original contract. (Bishop on Contracts, Sec. 812; *Peoples v. McTeer*, 14 S. E. 828; *Stex v. Roulston*, 15 S. E. 826.)

Time was of the essence of the contract by necessary implication. (Lindley on Mines, Sec. 859.)

A rescission is not affected by an offer to rescind until the offer is accepted. (*Robinson v. Pogue*, 86 Ala. 257, 5 So. 685; *Fripp v. Fripp*, 1 Rice (S. C.) Ch. 84; *Picot v. Douglas*, 46 Mo. 497; *Robinson v. Page*, 3 Russ. 114; *Murray v. Harvey*, 56 N. Y. 337; *Collins v. Baumgartner*, 52 Pa. St. 461; *Union Loco. Co. v. Erie Co.*, 37 N. J. Law, 23; *Rodman v. Rodman*,

64 Ind. 65; *White v. Corlies*, 46 N. Y. 467; *Raynor v. Berkely Co.*, 2 S. E. 119; *McDonald v. Boeing*, 43 Mich. 394.)

If it be true that the contract was rescinded, the new contract of rescission superseded the old contract, and respondent must rely on the new contract; he cannot occupy an inconsistent position. (Bliss on Code Pleading, Sec. 122; *Union Loco. Co. v. Erie Co.*, 37 N. J. Law, 23; *Lloyd v. Brewster*, 4 Paige, 537; *Brown v. Mandeville*, 95 N. Y. 237.)

As a matter of law, even had this been a contract where the respondent was bound to buy, as appellant was bound to sell, instead of being, as it was, a mere option, a stipulation inserted to the effect that on respondent's default appellant would be entitled to retain the payments made, would have added nothing to the contract. (*Reddish v. Smith*, 38 Pac. 1003; *Glock v. Howard & W. Co.*, 123 Cal. 1; *Hansborough v. Peck*, 5 Wall. 497.)

The vendee has no right of action for what he has paid, on the termination of the contract in consequence of his default: (*Glock v. Howard & Wilson Co.*, 123 Cal. 1; *Hansborough v. Peck*, 5 Wall. 497; *Lawrence v. Miller*, 86 N. Y. 131; *Wheeler v. Mather*, 56 Ill. 241; *Frost v. Frost*, 11 Me. 225; *Grimes v. Goud* (Me.), 10 Atl. 116; *Hill v. Grosser*, 59 N. H. 513; *Axford v. Thomas*, 160 Pa. St. 8; *Patterson v. Murphy* (Neb.), 60 N. W. 1; *Nason v. Woodward*, 16 La. 216; *Thompson v. Kelley*, 101 Mass. 291; *McManus v. Blackman*, 47 Minn. 331; *Grant v. Munch* (Minn.), 55 N. W. 902; *Dukes v. Baugh*, (Ga.), 16 S. W. 219; *McAlpine v. Reishenecker* (Kan.), 42 Pac. 339; *Reddish v. Smith* (Wash.), 38 Pac. 1003; *Pease v. Baxter* (Wash.), 41 Pac. 899; *Soper v. Arnold*, L. R. 14 App. Cas. 429.)

Money paid on an option cannot be recovered back. (*Steel v. Bond*, 32 Minn. 14; Warvelle on Vendors, p. 832.)

Messrs. H. G. & S. H. McIntire, for Respondent.

When the rescission is had by mutual consent, or by the terms of the contract, or in consequence of the default of the vendor,

the vendee is entitled to recover whatever he has paid toward the purchase money, unless there is an agreement connected with the rescission which restricts its operation. (2 Warvelle on Vendors (2d Ed.), p. 1031, Sec. 869; 4 Wait's Actions and Defenses, 501; *Gillett v. Maynard*, 5 Johns. 85, s. c. 4 Am. Dec. 329; *Towers v. Barrett*, 1 T. R. 133; *Sheard v. Welburn*, 67 Mich. 367; *Christy v. Arnold*, 36 Pac. Rep. 918; *Tice v. Zinsser*, 76 N. Y. 549; *Graves v. White*, 87 N. Y. 464; *Lake Shore & M. R. Co. v. Richards*, 30 L. R. A. 44-45, and cases therein cited; *Lloyd v. David* (Ind.), 38 N. E. Rep. 232; *Bentley v. Evans* (Tex.), 29 S. W. Rep. 497; *Utter v. Stuart*, 30 Barb. 20; *Minah Consol. M. Co. v. Briscoe*, 47 Fed. 281; *Gay v. Alter*, 102 U. S. 79; *Andrews v. Hensler*, 6 Wall. 254; *Bohall v. Diller*, 41 Cal. 535; *Doughten v. Camden Co.* (N. J.), 7 Atl. 480; *Frink v. Thomas*, 20 Ore. 265; *Cleary v. Folger*, 24 Pac. Rep. 280; *Drew v. Pedlar*, 25 Pac. Rep. 749; *White v. Buell*, 27 Pac. Rep. 19; *Phelps v. Brown*, 30 Pac. Rep. 774; *Merrill v. Merrill*, 30 Pac. Rep. 542; *Joyce v. Shaffer*, 32 Pac. Rep. 320.)

MR. COMMISSIONER CALLAWAY prepared the opinion for the court.

This controversy arose over an option contract executed by the defendant, as party of the first part, to the plaintiff, as party of the second part, concerning the lease and sale of the Golden Sunlight group of mines. By the terms of the contract, which was dated January 31, 1894, the plaintiff, at his option, was to pay the defendant \$500,000 as the purchase price of the property, in installments falling due at stated intervals; the last one being due October 1, 1896. A payment of \$50,000 was due April 1, 1895. The plaintiff had the right to make any or all of the payments prior to the stipulated periods. It was provided that the defendant should deposit in escrow with the Montana National Bank deeds for the property, conveying all its right, title and interest therein to John E. Searles and

Samuel Thomas, or either of them, as directed by the plaintiff. Paragraphs four and five of the contract read as follows:

"(4) It is expressly understood that in the event of failure by the party of the second part, or by his associates or assigns, to make the payment of any of the installments upon the dates mentioned in this agreement, then and in that event the said deed or deeds, covering all of said mines, mining claims, lands and properties mentioned in said Schedule A, are to be returned to the said party of the first part; and peaceful possession of all of said mines, mining claims, lands and properties shall in that event be surrendered by the party of the second part, or by his associates or assigns, to the said party of the first part, together with all the improvements, appurtenances, machinery, mills and fixtures placed upon said mines, mining claims, lands and properties by the party of the second part, or by his associates or assigns, upon demand being made for such possession by the said party of the first part—it being further understood that, in the event of such failure to pay any of said installments as herein provided, and possession of said properties being demanded by said party of the first part, then and in that event all the said improvements, appurtenances, machinery, mills and fixtures placed upon said property by the said party of the second part, or by his associates and assigns, shall revert to the said party of the first part.

"(5) That upon the payment of \$30,000 upon March 10, 1894, as herein provided, the party of the second part is to have immediate and undisturbed possession of all of said mining claims, lands and properties, with privilege to work the said mines, mining claims, lands and properties, to develop the same, and to mine and ship ores, and to receive the proceeds thereof, for the benefit of himself, or his associates or assigns; and the said party of the second part, his associates or assigns, are to receive all the product of said mines, mining claims, lands and properties for their own use, until failure occurs in the payment of any of said installments; providing, however, that the provisions of Section 6 of this agreement shall have first been

complied with. It is further understood that the party of the second part shall have the right to cut and use any trees upon said premises for improvements, or for mining purposes, or for fuel, in the operation of said properties."

Paragraph 6 provided that plaintiff should "diligently take the usual steps toward patenting such of said mining claims as are now unpatented," and should also expend from the net proceeds received from the shipments of ores between March 10, 1894, and October 1, 1894, the sum of \$40,000 in the erection of reduction works and the necessary equipment for conducting mining on said property.

Plaintiff was to have the use of all mining machinery and appliances then on the property, which were to be transferred as a part thereof.

In pursuance of this contract the plaintiff entered into possession of the premises and property on March 10, 1894, and continued in possession until April 2, 1895. At plaintiff's direction, defendant executed and placed in escrow deeds to the property mentioned in the contract, by the terms of which deeds the property was conveyed to John E. Searles. Subsequent to the execution of the contract Searles acquired an interest in it from the plaintiff, and the principal part of the money required to make the improvements spoken of and the payments mentioned below was advanced by him. While plaintiff was in possession of the premises he mined and extracted therefrom ores of the aggregate value of \$83,110.27, the net proceeds of which were invested in the property, for the purpose of developing and improving the same, and in the cost of mining and extracting said ores. The defendant did not admit that such expenditures were wisely incurred, or that the mines were operated to the best advantage. Plaintiff made the first four payments provided for in the contract, amounting to \$165,000. On March 28, 1895, the condition of the mine being disappointing to plaintiff, he applied to defendant for thirty days' grace in which to make the payment due April 1st following. March 29th the trustees of defendant held a meeting, at which it was

resolved that they "do not accept the modification asked, and that the agreement of January 31, 1894, with W. J. Clark, for sale of the Golden Sunlight group to John E. Searles, be adhered to."

The following telegraphic messages were then sent and received on the dates indicated therein:

"New York, March 31, 1895. To Bernard MacDonald, care American Developing & Mining Co., Butte, Montana: My principal dissatisfied with recent reports from the mine; but, if thirty days' extension granted, he will go out and investigate personally, and I hope to persuade him to go on. Answer, care Ballou, 10 Wall Street. Wm. Clark."

"Butte, Mont., March 31, 1895. Wm. J. Clark, Care Ballou, 10 Wall Street, New York: Default, restore property to company, and we will treat honorably with your principal. Bernard MacDonald, Pres't."

"New York, April 1, 1895. To Bernard MacDonald, Care American Developing & Mining Company, Butte, Mont.: Principal refuses to go to Montana unless extension granted. You stand with me. Think we can carry this through. You will find us honorable. Answer. Wm. J. Clark."

"Butte, Mont., April 1, 1895. To Wm. J. Clark, Care Geo. W. Ballou, 10 Wall Street, New York: Company cannot grant your request. Your principal is hereby assured of honorable treatment if default is made. Bernard MacDonald, Pres't."

"Butte, Mont., April 1, 1895. To John E. Searles, 117 Wall Street, New York: Replying to Clark's telegraphic solicitation for thirty days' grace on April payment, we wired him that would not be granted; but, if default was made, we would deal honorably with his principal. Reassuring you on this point, and that the property is one of the most valuable in Montana, we ask you to investigate mines and past management, promising you equitable treatment in case you then desire reconstruction: Bernard MacDonald, Pres't."

The plaintiff had cognizance of the telegram to Searles. It was never answered. All of the messages sent by defendant

were received in New York City on the same days they were dated and prior to the close of business by the bankers of that city on the respective days when received. No further or other communications were had between the plaintiff and defendant after April 2, 1895, as shown by the record.

Searles was able to pay the sum of \$50,000 on April 1, 1895, but neither he nor plaintiff ever made the payment due on that day. April 2, 1895, the defendant demanded and received from the Montana National Bank the deeds which had theretofore been placed in escrow, and on the same day demanded and received from the plaintiff possession of the properties therein described, thereby terminating the contract.

May 19, 1896, William J. Clark, the plaintiff, began this suit, claiming that the defendant had rescinded and abandoned the contract to which the plaintiff consented; but, notwithstanding such rescission and abandonment, the defendant had failed and refused to repay him the sum of \$165,000 theretofore paid on the contract. Plaintiff prayed judgment against defendant for that sum, together with interest thereon at the rate of 10 per cent. per annum from April 2, 1895, and for costs of suit.

Defendant answered, denying that it had rescinded or abandoned the contract, but admitted that it refused to repay the sum of \$165,000, or any part thereof. Then followed this allegation in the answer: "And defendant says that the plaintiff failed and refused, and still fails and refuses, to pay to it the sum of \$50,000, which by the terms of the contract in the complaint set forth became due and payable on April 1, 1895, and failed and refused, and still fails and refuses, to pay to the defendant any sum of money whatsoever; that on the 1st day of April, 1895, defendant was, ever since has been, and now is ready, able and willing to proceed with the aforesaid contract, upon the payment by the plaintiff to it of the sums in the said contract specified to be paid by the plaintiff to the defendant."

All of the foregoing appears from the pleadings and statement of facts agreed to by the parties, upon which the trial was had. The court rendered judgment for the plaintiff in accord-

ance with the prayer of the complaint. Defendant moved for a new trial, which was denied. From such judgment, and the order denying the motion for a new trial, defendant prosecutes this appeal.

Rescission is the unmaking of a contract, requiring the same concurrence of wills as that which made it, and nothing short of this will suffice. (Bishop on Contracts, Sec. 812; *Robinson v. Pogue*, 86 Ala. 257, 5 South. 685.) There is a wide difference between the rescission of a contract and its mere termination or cancellation. (*Winton v. Spring*, 18 Cal. 452; *Weil v. Jones*, 53 Cal. 46.) "It is well settled that a technical rescission of the contract has the legal effect of entitling each of the parties to be restored to the condition in which he was before the contract was made, so far as that is possible, and that no rights accrue to either by force of the terms of the contract. But, besides technical rescission, there is a mode of abandoning a contract as a live and enforceable obligation which still entitles the party declaring its abandonment to look to the contract to determine the compensation he may be entitled to under its terms for the breach which gave him the right of abandonment." (*Hayes v. City of Nashville*, 80 Fed. 641.) "Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situation which the wrong-doing of the other party has brought about." (*Anvil Mining Co. v. Humble*, 153 U. S. 540, 14 Sup. Ct. 876, 38 L. Ed. 814.)

Did the parties intend to rescind the contract, so as to place each other *in statu quo*? In determining whether such a rescission has taken place, courts look, not only to the language of the parties, but to all the circumstances, including the effect of a complete rescission upon the rights of those concerned, and the probability or improbability of their having desired to effect such a result. (*Hayes v. City of Nashville*, 80 Fed. 641, 26 C. C. A. 59.) We have seen that the plaintiff asked for thirty days' grace on March 28th in which to make the payment due three days later; that the defendant refused the request, demanding adherence to the contract; and that plaintiff then sent

the telegram of March 31st, saying his principal was dissatisfied with the reports from the mines, but, if thirty days' extension be granted, his principal would "go out and investigate personally," and plaintiff hoped "to persuade him to go on." This was tantamount to saying that, if the thirty days' extension be not granted, the payment would not be made. Then followed the telegram in which defendant said, "Default, restore property to company, and we will treat honorably with your principal."

It was quite natural for the defendant, in case the plaintiff abandoned the contract, to desire an immediate and peaceable possession of the premises. Common experience has taught that, while the peaceable possession of leased premises is promised to the lessor, it often happens that he has to resort to legal process in order to repossess himself of the property, and finds that after default has been made, and before he regains possession, much valuable property in the nature of fixtures has disappeared.

There was no promise of honorable treatment held out to plaintiff in the telegram just quoted. The promise of honorable treatment was to his principal. The defendant must have assumed that the plaintiff would be unable to proceed, and assurance was made that, in case plaintiff made default and restored the property, defendant would deal honorably with Searles, the man to whom the deeds were made, and who had furnished the principal part of the money. The language of the telegram excluded plaintiff from consideration. Plaintiff evidently so read it, for he replied: "Principal refuses to go to Montana. *You stand with me.* Think we can carry this through. You will find us honorable." The defendant remained obdurate. It said: "Company cannot grant your request. Your principal is hereby assured of honorable treatment if default is made." And, concluding the correspondence, observe the telegram sent to Searles, telling him the company would not grant any further time in which to make the payment due April 1st, assuring him of honorable treatment, of the value

of the property, asking him to investigate the mines and past management, and promising him equitable treatment in case he desired a "reconstruction." The inducements, if any were held out, were to Searles, and none whatever were made to plaintiff. He was excluded in no uncertain terms. The suggestion that Searles investigate the past management of the mines was by no means flattering to plaintiff. As to whether Searles ever did desire a "reconstruction," the record is silent. So far as we are able to tell, the defendant may have accorded to him the honorable treatment promised. He may be well satisfied. He is not a party to this suit, and there is no showing that Clark is acting in his behalf, or has succeeded to his rights in the premises.

It is apparent that Clark was merely Searles' agent, and as such agent he has no right to recover his principal's money. No communications between plaintiff and defendant appear after April 2d. No further action by plaintiff appears until May 19, 1896, when he commenced this suit. We are forced to the conclusion that under no phase of the case was any inducement held out to plaintiff, nor can we see, from anything in the record, any intention on part of defendant to rescind the contract. On the contrary, it stood upon the contract, insisted upon it, and the only inducement held out, if any there was, was the assurance of honorable treatment to Searles, and a "reconstruction" of the contract, should he desire it; and with this, as we have seen, plaintiff has in no way connected himself.

This view is strengthened when we examine the nature of the contract. The parties were dealing with property subject to "sudden, frequent and great fluctuations in value." (*Waterman v. Banks*, 144 U. S. 394, 12 Sup. Ct. 646, 36 L. Ed. 478.) They entered into a contract respecting its working and sale. The defendant gave the plaintiff the exclusive right to purchase within the time limited in the contract, and placed him in possession, giving him the use of its mining machinery, the right to cut and use its timber, and to work the mines and ex-

tract the ores therefrom as he should see fit. It took the risk of having its property ruined by unskillful work, and deprived of its most valuable ore bodies. When the mining property was leased, its showing of values was so great that plaintiff was willing to agree to \$500,000 as its purchase price. In the vicissitudes of mining this showing might have disappeared before the plaintiff had made the second payment, and he could have exercised his election to abandon the property at once. For these risks the defendant exacted certain payments. Without doubt these payments were required in the nature of an indemnity or of compensation.

The plaintiff on his part entered upon a mining venture—an enterprise fraught with hazard, but holding out the promise of rich returns. He took the risk of losing his investment, but presumably it was his expectation to extract from the mine more than sufficient to pay its price, and it was entirely within the realm of probability that he would uncover ore bodies worth millions with his first few months of operation. In this event he could hold defendant to its bargain. It could not repudiate the contract, as the plaintiff could. The plaintiff could enforce the specific performance of the contract by complying with its terms, but the defendant could not. Practically it had fulfilled all the conditions imposed upon it. Deeds conveying title to the property were in the bank.

The contract was unilateral, and by its express terms time was of its essence. "There is a decided distinction between an option to purchase, which may be exercised or not by the prospective purchaser, and an absolute contract of sale, wherein one of the parties agrees to sell and the other to buy certain property, the sale to be completed within an agreed time. In the latter case, of course, the mere lapse of time, with the contract unperformed, does not entitle either party to refuse to complete it, and therefore time is not of the essence of the contract. But where the contract is merely an option, generally without consideration, and especially as applied to mining property, of course, as pointed out in the last preceding sections,

time is of its essence, and the prospective purchaser must act promptly within the time specified, or his right to purchase is gone." (Snyder on Mines, Sec. 1378. And see Lindley on Mines, Sec. 839; *Settle v. Winters*, 2 Idaho, 215, 10 Pac. 216; Pomeroy on Contracts, Sec. 387; Fry on Specific Performance, 3d Ed., Sec. 1052.)

Whether partial payments made under absolute contracts of sale can be recovered by the prospective vendee upon a rescission of the contract is a question upon which the authorities are somewhat divided; but as to option contracts generally the rule is thus stated in Warvelle on Vendors, Sec. 824: "An option of purchase rests on different grounds, and is governed by different rules, from those which obtain in case of bilateral contracts. Where the time for acceptance is not limited, it must, if given for a consideration, remain open for a reasonable time, to be determined by all the circumstances of the case; but if the option reserved is to purchase at any time before a certain day for a certain sum, to be paid on demand for deed, time is of the essence of the contract, and equity cannot relieve after the time, nor require the repayment of money paid to secure the option." And we think that because of the peculiar conditions surrounding contracts for the sale of mining property, where the contract is unilateral, or in the nature of an option, providing for partial payments upon the purchase price at stated times, it is the manifest intention of the parties that the vendor shall retain all payments made, unless it is directly specified to the contrary; and although the contract be mutually rescinded, unless it affirmatively appears from the contract of sale, or in the agreement to rescind, that the vendee is to have the payments made by him refunded, he cannot recover them.

In this case plaintiff contends that, as there is no provision in the contract authorizing defendant to retain the payments, it may not do so. In addition to what we have said above, we quote the following from *Reddish v. Smith*, 10 Wash. 178, 38 Pac. 1003, 45 Am. St. Rep. 781, in which a similar argument was made: "We do not think this is a legitimate construction

of the contract. While it is true that the courts will not supply language to create a forfeiture, where the forfeiture is not specially provided for by the parties themselves, yet it seems to us that it was the clear, unequivocal intention of the parties to this contract, as expressed by the contract, that the payments made by the appellants should be forfeited, in case the respondents elected so to do, upon the nonperformance of the contract by the appellants. The option of forfeiture is for the benefit of the vendor; but it would be difficult to conceive what benefit would accrue to the vendor in a case of this kind, if he were not allowed the benefit of the payments which had been made." And in *Lawrence v. Miller*, 86 N. Y. 131, it is said: "The plaintiff in the action before us sues for the whole amount of the money paid by the vendee. The defendant came by it rightfully, in pursuance of a contract lawfully made, between competent parties. He has made no breach of that contract. He has failed in no duty to the vendee. Wherefore, then, should he give up that which was rightfully his own? When and whereby did it cease to be his, and to be due to the vendee? If the contract had been kept by both parties, the money paid would still be his of right."

Another insuperable obstacle appears in the way of plaintiff's recovery. Under the general rule, following the rescission of a contract for the sale of real estate, the parties must be placed practically *in statu quo*. How can the defendant be placed *in statu quo* if the \$165,000 be returned to plaintiff? The ore bodies which were in place in the mine when the plaintiff took possession have been exhausted to the extent of \$83,110.27. Whether the plaintiff's working benefited the mine in any particular is not disclosed by the record. It is not necessary to discuss this subject further.

We are therefore of the opinion that the judgment and order should be reversed, and the cause remanded for a new trial.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order are reversed, and the cause is remanded for a new trial.

28	482
36	419
36	421

SNELL, RESPONDENT, v. WELCH ET AL., APPELLANTS.

(No. 1,955.)

(Submitted June 23, 1903. Decided July 14, 1903.)

Fictitious Appeal—Dismissal.

Where, after the service of an order, made in a suit, restraining defendants from awarding any contracts under a legislative Act, defendants awarded contracts in a manner satisfactory to plaintiff in the suit, the appeal by defendants from the order will be dismissed.

Appeal from District Court, Lewis and Clarke County; J. M. Clements, Judge.

SUIT by Chas. H. Snell against W. W. Welch and others, members of the textbook commission of Montana. From an order restraining defendants from proceeding under an Act of the legislature, defendants appeal. Appeal dismissed.

Mr. James Donovan, Attorney General, for Appellants.

Mr. Robert B. Smith, Mr. Edward Horsky, and Mr. E. A. Carleton, for Respondent.

PER CURIAM.—This cause is before the court upon the appeal of the defendants from an order enjoining them “from proceeding or acting under a certain Act of the Eighth Legislative Assembly of the State of Montana, to-wit, Senate Bill No. 84, entitled ‘An Act to create a state textbook commission for the purpose of adopting and maintaining a uniform series of textbooks for the public schools of Montana; to regulate the price of same; define the duties and powers of said commission and appropriating a sum of money named therein for the expenses of said commission,’ approved March 7, 1903 (Chapter 122, Laws of 1903); or from receiving any bid or bids, or letting any contract or contracts, for the furnishing of public school

textbooks under said Act, unless they shall receive, consider, and treat any and all bids which may be offered for the furnishing of said textbooks, or from awarding any contract or contracts therefor, irrespective of whether the bidder or bidders attach to said books the union label or not." The Act referred to is entitled as stated in the above order, and provides, among other things, that "all textbooks shall bear the union label."

It is certain from statements made by counsel for appellants and respondents, respectively, to this court, during the argument, that the defendants, after service of the injunction order, at the time and place prescribed in the Act, met for the purpose of letting all necessary contracts for the awarding of which the meeting was held under the law, and did let the same; the letting of all being done in the way and manner satisfactory to both appellants and respondent, and then adjourned. There is nothing in this case now for us to decide. It has been disposed of by the parties themselves pending the appeal. If the defendants (appellants here) desired to have the courts consider and decide the questions involved in the case, they might have adjourned from day to day without action, until the cause—which had been advanced upon the calendar upon their motion and set for hearing—had been decided. This they did not do. They have acted, and presumably they have obeyed the order of the lower court.

We are to decide questions arising and undetermined in a case pending, and we may "not tender advice upon matters not in litigation." (*State ex rel. Begeman v. Napton*, 10 Mont. 369, 25 Pac. 1045.) The appeal is dismissed.

Dismissed.

NORTHWESTERN MUTUAL LIFE INSURANCE
COMPANY, RESPONDENT, v. LEWIS AND
CLARKE COUNTY, RESPONDENT.

(No. 1,921.)

(Submitted June 15, 1903. . Decided July 15, 1903.)

Taxation—Insurance Companies—Construction of Act—Constitutionality.

1. Section 681 of the Civil Code applies to a foreign mutual life insurance company.
2. Section 681 of the Civil Code applies to domestic, as well as foreign, insurance companies, and therefore complies with Section 11, Article XII, of the State Constitution, which provides that taxes shall be "uniform upon the same class of subjects."
3. The legislature has the right to prescribe reasonable terms upon which foreign corporations may do business in the state.
4. Section 681 of the Civil Code, applying, as it does, only to business transacted within the state, is not objectionable as interfering with interstate commerce.
5. The franchise right of a foreign company to do business in this state is property, and if it proves valuable, it is a proper subject for taxation within the meaning of Article XII of the State Constitution.
6. Section 681 of the Civil Code was not repealed by implication by Act March 4, 1897 (Session Laws 1897, p. 76), which is a general license law relating to insurance companies, both domestic and foreign, and applying to all classes and kinds of insurance; the fee therein provided for being required to be paid prior to the transaction of any business, and being a fixed sum, varying in amount only at the will of the company as to the amount of premiums it asks permission to collect, and not being diminished by reason of losses paid or expenses incurred.
7. Section 681 of the Civil Code declares that "each and every insurance corporation or company transacting business in this state must be taxed upon the excess of premiums received over losses and ordinary expenses incurred within the state during the year." It further provides that "Insurance companies and corporations are subject to no other taxation under the laws of this state, except taxes on real estate and fees imposed by law. *Held*, that the clause last quoted was unconstitutional, but that the invalidity of this clause did not render unconstitutional nor void the remainder of the section.
8. When the valid and invalid portions of a legislative enactment are capable of being separated, and the valid part is a complete Act, and not dependent upon that which is void, the latter alone will be rejected, and the rest sustained, if it is manifest that the void part was not an inducement to the legislature to pass the part which is valid.
9. Courts will not declare an Act of the legislature unconstitutional unless it is clear, beyond a reasonable doubt, that such Act is inhibited by the constitution.

MR. JUSTICE MILBURN dissenting in part.

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Appeal from District Court, Lewis and Clarke County; J. M. Clements, Judge.

ACTION by the Northwestern Mutual Life Insurance Company against the county of Lewis and Clarke. Judgment for plaintiff. Defendant appeals. Modified.

Mr. James Donovan, Attorney General, for Appellant.

It is conceded that the last sentence of Section 681 is unconstitutional, as the conflict of said provision with Section 7, Art. XII, of the Constitution is apparent; but the contention is made that the remainder of said section is separable from the invalid portion, complete in itself, and not affected thereby, and is a subsisting and enforceable enactment without reference to the part which is inoperative and void.

The tax imposed in Section 681 may be considered as a tax upon the privilege accorded corporations of the character mentioned therein—whether domestic or foreign—to do business, in this state; as such it may be said to be a tax upon business, or a franchise tax, considering such privilege as a franchise. (*Southern Building & Loan Association v. Norman*, 98 Ky. 294; *Cooley on Taxation*, 2d Ed., page 386.)

Under our constitution and statutes a franchise is property (Const. Art. XII, Sec. 17; Political Code, Sec. 3680, Subd. 1), and it was incumbent upon the legislature to tax these premiums at the same rate as other property under Section 1, Article XII, Constitution, requiring a "uniform rate of assessment and taxation." Taxes upon the franchises of companies or corporations have been uniformly upheld. (*People v. Equitable Trust Co.*, 96 N. Y. 387; *People v. Home Ins. Co.*, 92 N. Y. 328; *Scottish Union & Nat'l Ins. Co. v. Herriott* (Iowa), 80 N. W. 665; *Kittanning Coal Co. v. Comm.*, 79 Pa. St. 100; *Germania Life Ins. Co. v. Comm.*, 85 Pa. St. 513; *Ins. Co. of North America v. Comm.*, 87 Pa. St. 173; *Porter v. R. R. I. etc. R. Co.*, 76 Ill. 561; *Conn. Ins. Co. v. Comm.*, 133 Mass. 161; *Western Union Tel. Co. v. Board of Assessment*, 80 Ala.

273; *State v. Board of Assessment*, 47 La. Ann. 1498; *Mutual Ins. Co. v. Augusta*, 109 Ga. 73; 1 Desty on Taxation, 228, 372, 375.)

Treating the tax imposed by Section 681 as a property tax upon the funds represented by such net premiums, it is valid. (*U. S. Express Co. v. Ellyson*, 28 Iowa, 370; *Hawkeye Ins. Co. v. French* (Iowa), 80 N. W. 661; *City of Dubuque v. Chicago, D. & M. R. Co.*, 47 Iowa, 196; *Republic Ins. Co. v. Pollak*, 75 Ill. 300; *Pringhar State Bank v. Rerick* (Iowa), 64 N. W. 801; *Ames v. People*, 26 Colo. 83; *Boyd v. Wiggins*, 7 Okla. 85; *St. Louis, etc. Co. v. Worthen*, 7 L. R. A. 374; *In re H. B.* 270 (Colo.), 21 Pac. 476.)

There is no merit in the contention that Section 681 is unconstitutional for the reason that it provides for the taxation of the "excess of premiums," whether the money collected is in or out of the state, on March 1 of each year. (*Delaware & H. Canal Co. v. Comm.* (Pa.), 1 L. R. A. 232; *Western Union Tel. Co. v. Comm.*, 110 Pa. St. 407; *St. Clair v. Cox*, 106 U. S. 350.)

The legislature may impose a license tax in addition to other taxes. (Constitution, Art. XII, Sec. 1; *State v. French*, 17 Mont. 54; *Scottish Union & Nat'l Ins. Co. v. Herriott* (Iowa), 80 N. W. 668; *Pembina Consol. S. M. & M. Co. v. Pennsylvania*, 125 U. S. 181; Cooley on Taxation (1st Ed.), pp. 385, 386; Cooley on Taxation (2d Ed.), pp. 571, 573, and cases cited in notes 1 and 2 on page 573; *People v. State Treasurer*, 31 Mich. 6; *People v. Thurber*, 13 Ill. 554.)

The last sentence of Section 681, though void, in no manner affects the validity of the remainder of the section. (*Ball v. Ridge Copper Co.*, 118 Mich. 7, 76 N. W. 130; *State v. Stuht*, 52 Neb. 209, 71 N. W. 941; *State v. F. & M. Co.*, 59 Neb. 1, 80 N. W. 52; *Scott v. Flowers* (Neb.), 85 N. W. 857; *In re Assessment, etc.* (S. D.), 54 N. W. 818; *People v. Creery*, 34 Cal. 451; *Dwyer v. Parker*, 115 Cal. 544; *People v. Whyler*, 41 Cal. 351; *Higgins v. Ricker*, 47 Texas, 405; *State v. Duluth*

Gas & Water Co., 78 N. W. 1032; *City of Dubuque v. C. D. & M. R. Co.*, 47 Iowa, 216.)

The power of the judiciary to declare a statute unconstitutional should never be exerted except where the conflict between it and the constitution is palpable and incapable of reconciliation. (*Stockton, etc. Co. v. Stockton*, 41 Cal. 147.)

A reasonable doubt as to the constitutionality of a statute will be resolved in favor of its validity. (*University of California v. Bernard*, 57 Cal. 612; *Young v. Salt Lake City* (Utah), 67 Pac. 1066.

Messrs. Toole & Bach, and *Mr. M. S. Gunn*, for Respondent.

The concluding sentence of Section 681 clearly exempts the personal property of insurance companies and corporations from taxation in violation of the provisions of Sections 1 and 7 of Article XII of the Constitution of this state. (*Ins. Co. v. French*, 80 N. W. 660; *State v. Poynter*, 81 N. W. 431.)

The invalidity of the last sentence of said section has the effect of rendering the entire section invalid. (*State v. Poynter* (Neb.), 81 N. W. 431; Cooley on Const. Lim., 5th Ed., pp. 213, 214; *Pollock v. Farmers' L. & T. Co.*, 158 U. S. 601-635; *Warren v. Mayor*, 2 Gray, 84-89; *Jones v. Jones*, 104 N. Y. 235; *Wills v. Austin*, 53 Cal. 152-179; *Allen v. Louisiana*, 103 U. S. 84; Sutherland on Stat. Const., Secs. 176-180.)

Appellant's contention that the section under consideration provides for the taxation of a franchise within the meaning of the term as used in Section 17 of Article XII of the Constitution, and is therefore a property tax, is clearly erroneous. (*State v. French*, 17 Mont. 54; *State v. Minn. T. M. Co.*, 41 N. W. 1020; *Ex parte Cohn*, 13 Nev. 424; *Atlanta N. B. & L. A. v. Stewart*, 35 S. W. 73; *Scottish, etc. Ins. Co. v. Herriott*, 77 Am. St. Rep. 548; *Walker v. City of Springfield*, 94 Ill. 364; Thompson on Corporations, Sec. 5560; *Royall v. Virginia*, 116 U. S. 572; *License Tax Cases*, 5 Wall. 462-471; *People v. Martin*, 60 Cal. 153; *State v. Camp Sing*, 18 Mont. 128.)

Section 681 is unconstitutional for the reason that it provides for the taxation of the "excess of premiums" whether the money is in or out of the state on the first Monday of March, whereas there is no authority to tax any other personal property unless the same is within the state at 12 o'clock M. on that day. (Political Code, Secs. 3700, 3701; *Board of County Commissioners v. Wilson* (Colo.), 24 Pac. 563; *Graham v. Board of County Com'rs*, 2 Pac. 549; Cooley on Taxation, 2d Ed., pp. 354-355; *Clark v. Norton*, 49 N. Y. 243; *Overing v. Foote*, 65 N. Y. 263; *People v. Kohl*, 40 Cal. 127; *St. Louis v. Ferry Co.*, 11 Wall 423; *People v. Equitable Trust Co.*, 96 N. Y. 387; *Maxwell v. People*, 59 N. E. 1101; *Pennsylvania v. Standard Oil Co.*, 101 Pa. St. 119; *Ferry Co. v. Pennsylvania*, 114 U. S. 196; Cooley on Taxation, 2d Ed., p. 352; *Railey v. Board of Assessors*, 11 So. 93; *Met. Life Ins. Co. v. Mayor, etc.*, 40 Atl. 573; *Village of Howell v. Gordon*, 86 N. W. 1042.).

MR. COMMISSIONER POORMAN prepared the opinion for the court.

This action was commenced in the district court on the 21st day of May, 1902, by the filing of an agreed case, and was instituted for the purpose of determining the validity of a tax claimed to be due from the plaintiff to the defendant "upon the excess of premiums received over losses and ordinary expenses incurred within the state" during the previous year. The name of the plaintiff expresses the character of business transacted. Judgment was rendered for plaintiff, and from this judgment defendant appeals.

The agreed case complies with the provisions of Section 2050 *et seq.* of the Code of Civil Procedure, and the record shows that all steps have been taken and all proceedings had necessary to present for determination the questions involved in the error assigned. The points of controversy upon which the decision of the supreme court is asked are as follows: (1) Does Section

681 of the Civil Code of the state of Montana apply to foreign mutual life insurance companies? (2) Is any authority given by said Section 681 to assess taxes against a foreign mutual life insurance company? (3) Has said Section 681 been repealed, or is it still in force? (4) Is said Section 681 constitutional?

Section 681 of the Civil Code reads as follows: "Each and every insurance corporation or company transacting business in this state must be taxed upon the excess of premiums received over losses and ordinary expenses incurred within the state during the year previous to the year of listing in the county where the agent conducts the business, properly proportioned by the corporation or company at the same rate that all other personal property is taxed, and the agent shall render the list, and be personally liable for the tax; and if he refuse to render the list or to make affidavit that the same is correct, to the best of his knowledge and belief, the amount may be assessed according to the best knowledge and discretion of the assessor. Insurance companies and corporations are subject to no other taxation under the laws of this state, except taxes on real estate and the fees imposed by law."

1. Does this provision apply to foreign life insurance companies? This section is a part of Chapter I, Title IV, Part IV, Division I, of the Civil Code, and is entitled "Stock and Mutual Insurance Corporations." The agreed case contains the statement that the respondent was doing the business of a foreign mutual life insurance company. Sections 650 to 668, both inclusive, of this chapter, provide for the formation and regulation of domestic mutual insurance companies. Sections 669 to 680, inclusive, apply to foreign insurance companies and societies. Section 681, as will be seen, applies to "each and every insurance corporation or company transacting business in this state." The conclusion must be that it was the intention of the legislature to extend the provisions of this latter section to insurance companies doing business of the character specified in the agreed case.

2 and 3. Section 1 of Article XII of the State Constitution reads: "The necessary revenue for the support and maintenance of the state shall be provided by the legislative assembly, which shall levy a uniform rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, except that specially provided for in this article. The legislative assembly may also impose a license tax, both upon persons and upon corporations doing business in the state." Two schemes or systems of taxation are recognized by this section—a property tax and a license tax. Authority is also given by this section for the coexistence of both of these systems of taxation with reference to the same person or corporation. The two systems are not mutually dependent. Each is independent of the other, and the existence of one is not a bar to the imposition of the other. Nor is it necessary that the license system should be employed only as a police supervision or regulation. The constitution confers upon the legislature the authority to employ both systems of taxation in the exercise of its duty to provide "the necessary revenue for the support and maintenance of the state." No limitation is placed upon the purposes for which the license system may be employed, and it may be resorted to for the purposes of revenue, or for the purposes of regulation, or for both of such purposes, in the discretion and wisdom of the legislative will. (*State v. Camp Sing*, 18 Mont. 128, 44 Pac. 516, 32 L. R. A. 635, 56 Am. St. Rep. 551; *State ex rel. Sam Toi v. French*, 17 Mont. 54, 41 Pac. 1078, 30 L. R. A. 415.) The justice of the license system of taxation for any other purposes than those of police supervision and regulation has many times been called in question, but this is a matter for legislative determination.

Section 7 of this Article of the Constitution provides that "all corporations in this state, or doing business therein, shall be subject to taxation * * * on real and personal property owned or used by them." Section 11 of the same Article provides that taxes shall be "uniform upon the same class of

subjects." Section 17 of the same Article reads: "The word 'property' as used in this Article is hereby declared to include moneys, credits, bonds, stocks, franchises and all matters and things (real, personal and mixed) capable of private ownership, but this shall not be construed so as to authorize the taxation of the stocks of any company or corporation when the property of such company or corporation represented by such stocks is within the state and has been taxed." This latter section, in its definition of that which may be made subject to taxation, is sufficiently comprehensive to include all matters and things, visible and invisible, tangible and intangible, corporeal and incorporeal, capable of private ownership.

The provisions of the section of the statute under consideration apply indiscriminately to "each and every insurance corporation or company transacting business in this state." This includes domestic, as well as foreign, insurance companies. The law is therefore "uniform upon the same class of subjects." The legislature has the right to prescribe reasonable terms upon which foreign corporations may do business in this state. (*Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357; *Southern B. & L. Association v. Norman*, 98 Ky. 294, 32 S. W. 952; *Scottish U. & N. Ins. Co. v. Herriott*, 109 Iowa, 606, 80 N. W. 665, 77 Am. St. Rep. 548.) The character, kind and amount of business done by the company, as well as the situs of its tangible property, may be considered in applying the various systems of taxation.

The franchise of a corporation is granted by the jurisdiction where the company is incorporated, and its situs is in the state or country of its origin; but before the company can do business in this state it must comply with the terms of the statute relating thereto, and upon such compliance a certificate of authority is issued to it. It then stands, under this law, on the same footing with domestic companies, and is subject to the same taxation on the same class of property. This certificate of authority issued to a foreign insurance company confers upon such company a privilege or right not possessed or en-

joyed by citizens generally, and not conferred upon it by its original franchise. This right or privilege so conferred is in that sense a franchise, and by it the company is authorized to establish, conduct, and maintain an insurance business, the value of which is ascertained in the manner prescribed by statute; that is, "the excess of premiums over losses and ordinary expenses incurred." It applies only to business transacted within the state, and is not objectionable as interfering with interstate commerce. "'Business done within this state' cannot be made to mean business done between that state and other states." (*Pacific Express Co. v. Seibert*, 142 U. S. 339, 12 Sup. Ct. 250, 35 L. Ed. 1035.) The situs of the business done is therefore within the state. Though the company may transact a large business, yet the expenses and losses may equal or exceed the amount received. In that event the company pays no taxes. The method adopted by the statute of ascertaining the value of the privilege or right granted to the company is eminently a fair one, for the reason that it seeks to make only the net proceeds or profits the measure of value; and the taxes imposed by this statute are not a fixed or arbitrary amount, but are determined at the same rate that all other personal property is taxed.

Judge Cooley, in considering the subject of taxing business and privileges, says: "And what is true of property is true of privileges and occupations also; the state may tax all, or it may select for taxation certain classes." (Cooley on taxation, 2d. Ed., page 570.) Further on he says: "Taxes which are most customary are: (1) On the privilege of carrying on the business. (2) On the amount of business done. (3) On the gross profits of the business. (4) On the net profits or profits divided. * * * It has been seen that it is no conclusive objection to any such tax that it duplicates the burden to the person who pays it. To tax a merchant upon his stock as property, and also upon his gross sales, may seem burdensome; but it is not unconstitutional, when the people have not seen fit expressly to forbid it. The

two taxes are not identical, and, though it may operate unjustly in individual cases to impose both, such will not be a necessary result." (Cooley on Taxation, 2d Ed., page 571.) Again we find this language: "But license and tax do not necessarily go together; a license may be required when no tax is imposed, and an unconditional license does not exempt the licensee from being taxed upon the privilege it gives him. In this particular all valuable privileges stand upon the same footing; they are all liable to taxation at the will of the state, unless the state has bargained to exempt them. As is said in one case: 'There is a clear distinction recognized between a license granted or required as a condition precedent before a certain thing can be done, and a tax assessed on the business which that license may authorize one to engage in.' * * * The privilege obtained by the license may therefore be taxed in consideration of the property value it possesses." (Cooley on Taxation, 2d Ed., page 573.)

The nature of the business transacted by an insurance company does not require it to have any tangible property within the state on the first Monday in March of each year, when property becomes liable for taxation. Yet its business is here; it owns or possesses the privilege of doing that business within this state; and under the provisions of Section 681, *supra*, the business transacted must result in a profit to the company before taxes can be levied. If the privilege granted, which has the force and effect of a franchise, and is therefore property under the constitution, proves to be valuable, it is a proper subject for taxation within the meaning of Article XII of the State Constitution. Whether this is regarded as a tax upon the value of the franchise right of the company to do business in this state, measured by the net income, or as a tax on the business established and done, regarded as property separate from the money received as premiums, the value of which is measured by the same standard, is immaterial. The tax remains the same.

The Act of March 4, 1897 (Sess. Laws 1897, p. 76), is a general license law, relating to insurance companies, both do-

mestic and foreign, and applies to all classes and kinds of insurance. The fee therein required must be paid prior to the transaction of any business. It is a fixed sum, varying in amount only at the will of the company as to the amount of premiums it asks permission to collect, is not diminished by reason of losses paid or expenses incurred, and a violation of the Act is punishable by fine and imprisonment. This Act does not in express terms repeal Section 681, or that part of said section under which this tax is levied, and it is so dissimilar in its requirements that no repeal by implication can be inferred. These considerations lead to the conclusion that the legislature of the state has an undoubted right to provide for the assessment and taxation of insurance companies as provided in Section 681 of the Civil Code, and that that part of said section relating to such assessment is not repealed by any subsequent enactment.

As supporting or discussing the general views herein expressed, we cite the following authorities: *Cooley on Taxation*, 2d Ed., 570 *et seq.*; *Southern Building & Loan Association v. Norman*, 98 Ky. 294, 32 S. W. 952; *Scottish U. & N. Insurance Co. v. Herriott*, 109 Iowa, 606, 80 N. W. 665, 77 Am. St. Rep. 548; *Porter et al. v. Rock Island, etc. Railroad Co.*, 76 Ill. 561; *People v. Equitable Trust Co.*, 96 N. Y. 387; *People v. Home Insurance Co.*, 92 N. Y. 328; *Western Union Tel. Co. v. State Board of Assessment*, 80 Ala. 273, 60 Am. Rep. 99; *U. S. Express Co. v. Ellyson et al.*, 28 Iowa, 370; *Insurance Co. of North America v. Commonwealth*, 87 Pa. 173, 30 Am. Rep. 352; *Kittanning Coal Co. v. Commonwealth*, 79 Pa. 100; *Connecticut Mutual Life Ins. Co. v. Commonwealth*, 133 Mass. 161.

4. It is next contended that Section 681 is in conflict with the state Constitution, and is therefore void. In investigating the history of the law for the discovery, if possible, by both intrinsic and extrinsic evidence, the intent of the legislature in enacting this section, we find that the section is practically the same as the first half of Section 37 of the Act of 1883 (Sess.

Laws 1883, p. 83), and is incorporated in the Compiled Statutes of 1887 as Section 600, Fifth Division. The Act of 1883 was amended in 1885 (Sess. Laws 1885, p. 87), and was repealed in 1887 by Council Bill No. 33, approved March 10, 1887; the section enacted in lieu of Section 37 being Section 1676, Fifth Division, Compiled Statutes of 1887. At the extraordinary session of 1887 all of "C. B. No. 33" was repealed by House Bill No. 2, approved September 14, 1887. (Extr. Sess. Laws 1887, p. 82.) "C. B. No. 33," although entirely repealed by the Act of September 14, 1887, is included in the Compiled Statutes of 1887 as Sections 1665 to 1789, both inclusive. Section 681, *supra*, was not an existing law at the time of the adoption of the Code, within the meaning of Section 4653 of the Civil Code, and was not law until made so by the adoption of the Codes in 1895. It must therefore be construed as an original Act of the legislature of that year.

Section 7 of Article XII of the Constitution provides, among other things, that "the power to tax corporations or corporate property shall never be relinquished or suspended." The evident meaning of this constitutional provision is that the property of corporations shall bear its equal share of the burdens of taxation, and that the provisions of Section 1 of this Article of the Constitution, that the legislature "shall prescribe such regulations as shall secure a just valuation for taxation of all property," applies to artificial as well as to natural persons. Said Section 681, after providing for the taxation of insurance companies on the excess of premiums over losses and expenses, contains another sentence which reads: "Insurance companies and corporations are subject to no other taxation under the laws of this state, except taxes on real estate and the fees imposed by law." Under this latter provision an insurance company may be the owner of a vast amount of personal property situated within this state, on which it cannot be taxed, because the same cannot be classified under the head of "excess premiums," whether the term "excess premiums" means surplus money or the value of the company's franchise or business regarded as

property. This part of the section is so directly in contravention of the provisions of the Constitution above quoted that further comment is unnecessary. Such statutes have been held void under similar constitutional provisions in the following cases: *State ex rel. Cornell v. Poynter*, 59 Neb. 417, 81 N. W. 431; *Hawkeye Ins. Co. v. French*, 109 Iowa, 585, 80 N. W. 660; *People v. McCreery*, 34 Cal. 432; *People v. Whyler*, 41 Cal. 351.

The remaining part of this section is not invalid, as conflicting with the organic law, unless made so by the unconstitutionality of the clause above considered. The effect of the conclusion reached with reference to the exemption clause of this section upon the section as a whole, and the chapter of which it is a part, remains to be considered. "When the valid and invalid portions of the legislative enactment are capable of being separated, and the valid part is a complete act, and not dependent upon that which is void, the latter alone will be rejected, and the rest sustained, if it is manifest that the void part was not an inducement to the legislature to pass the part which is valid; but if it is manifest, from an inspection of the law itself, that the invalid portion formed an inducement to its passage, the entire act will fall." This rule of construction has been so long recognized and so universally applied that it is now regarded as elementary law. (*State ex rel. Cornell v. Poynter*, 59 Neb. 417, 81 N. W. 431; *Warren v. Mayor, etc. of Charlestown*, 2 Gray, 84; *Pollock v. Farmers' Loan & Trust Co.*, 158 U. S. 601, 15 Sup. Ct. 912, 39 L. Ed. 1108.) In the application of this rule, however, the court must take into consideration the various provisions of the organic law of the land where the statute is sought to be enforced.

The Constitution prescribes the duties of the various coordinate departments of the state government. Each department is supreme within its proper sphere, and is subordinate only to the provisions of the organic act, which the people have adopted as the fundamental law, and the laws enacted in pursuance thereof. To the legislative department is delegated the

duty of providing the necessary revenue for the support of the state; and it is provided that the legislature *shall* provide this revenue, *shall* levy a uniform rate of taxation, *shall* prescribe such regulations as shall secure a just valuation of *all* property unless otherwise provided (Section 1, Art. XII, Const.), that the power to tax corporations and corporate property shall never be relinquished or suspended (Section 7, Art. XII), and taxes shall be uniform upon the same class of subjects (Section 11, Art. XII). These provisions of the Constitution are mandatory. (Section 29, Art. III.) It was the plain duty of the legislature to provide for the assessment and taxation of all the property of corporations situated within this state, as the word "property" is defined by the Constitution itself. (Section 17, Art. XII.)

The first part of this section (681) is a complete enactment within itself, without reference to the second part, and does not depend for its validity upon the second part, unless that was the inducement or compensation for the enactment of the first part of the section. In the enactment of the first part of this section the legislature provided for the taxation of a certain class of property, and provided a method of ascertaining its value. This was in accordance with constitutional provisions. In the last part of the section the legislature exempted certain other property from taxation. This was in contravention of constitutional provisions. Can this disregard of the Constitution in the one instance be a sufficient inducement and compensation to render invalid and unconstitutional the obedience to the Constitution in the other instance? Can a duty properly performed and completed with reference to one class of property be invalidated by a disregard of duty with reference to another class of property belonging to the same individual? If the matter of taxation were solely one of legislative discretion, not controlled as to duty of action and uniformity of levy and assessment by constitutional provisions, an exemption of one class or item of property might have the effect of an "inducement" or "compensation" for the taxation of another class or item, with-

out which "inducement" or "compensation" the law would not have been enacted at all. But here the fundamental law of the state commands action as to all property. The legislative inducement to this action is the constitutional command requiring it, and the necessity of providing a revenue for the support and maintenance of the state. The legislative compensation is duty performed and the protection and support of the state. The consent of the taxpayer is not necessary to the validity of a revenue law. The inducement or compensation which actuates him to pay the tax does not rest upon the exemption of a part of his property from taxation. That which induces the individual to pay taxes is not only his sense of duty, but the further fact that the law compels him to pay it. His compensation is the protection he receives from the state, which the tax he pays helps to support.

One of the cases chiefly relied upon by respondent is *State ex rel. Cornell v. Poynter*, 59 Neb. 417, 81 N. W. 431. In this case the Supreme Court of Nebraska had under consideration the constitutionality of an Act of the legislature providing for the organization, incorporation and taxing of insurance companies, and for their admission from other states. Sections 36 and 37 of the Act were the only ones which provided for the payment of taxes, filing fees, and licenses by the corporations. These sections contained provisions similar to that found in the exemption clause of Section 681 of our Civil Code; but an examination of this Act of the Nebraska legislature will disclose the fact that its terms are somewhat different from that of the section of the Civil Code now under consideration. The court, in passing upon the case, says: "Section 36, Chapter 47, Session Laws 1899, provides that each domestic insurance company organized under said law shall be taxed upon the excess of premiums over losses and ordinary expenses incurred in the state during the preceding year, in the county where the agent conducts the business, properly apportioned by the company, at the same rate other personalty is taxed, and that the fees and taxes specified in said section shall be in lieu of all fees and

taxes, excepting those upon real estate and other taxes provided in the general revenue law; while by Section 37 * * * every other state insurance company shall pay certain fees, and in addition two per cent. of their gross premiums, into the state treasury, and that the same 'shall be in full of all fees and taxes, except taxes on real estate, which may be imposed by any county, municipality or the state.' By these two sections all insurance companies are not taxed alike." The court then holds that Sections 36 and 37 are unconstitutional, for the reason that they exempt property from taxation, and for the further reason that they violate the uniformity clause of the Nebraska constitution with reference to taxation. The court further holds that the entire Act of which these sections are a part is void, for the reason "it requires no argument to demonstrate that Chapter 47 of the Laws of 1899 would not have received the approval of the Legislature, had it not contained any provision for the payment of fees and taxes by the insurance companies; and it is equally plain that the same amount of fees and taxes imposed by Sections 36 and 37, and the requirement that the same should be paid into the state treasury, would not have been incorporated into the law, had the unconstitutional provisions exempting insurance companies from taxation been eliminated from the bill."

It will be noticed that this Nebraska statute provided in part for the payment of a fixed sum to be levied and paid, without reference to the value of the companies' business, that it provided for the levy of taxes which were unequal between the two classes of insurance companies, that it also provided for the filing fees to be paid by the companies and for the payment of license by the companies, and that the provisions respecting all these various taxes and fees were so united as to constitute an entity; and the court therefore held that the entire sections were void, and that the Act of which they were a part must necessarily be void, for the reason that it was apparent that the legislature did not intend to wholly exempt insurance companies from the payment of taxes. In the section of the law now

before us there is no commingling of different systems of taxation, nor is there any fixed or arbitrary amount of taxes named. The uniformity clause of the Constitution is not violated.

In *Slauson et al. v. City of Racine*, 13 Wis. 398, certain lands were annexed to the city of Racine under a provision that they should be exempt from a certain tax; and the court held that this exemption was void, and that, it appearing that that was the condition on which the lands were annexed to the city, the entire Act providing for their annexation was void.

The exemption in this case was clearly an inducement to the parties owning the lands to permit them to be brought within a jurisdiction, and make them subject to ordinances, regulations and burdens which they did not bear before.

In *State v. Duluth Gas & Water Co.*, 76 Minn. 96, 78 N. W. 1032, 57 L. R. A. 63, the court, in considering a statute providing for the listing and assessing for taxation of franchises and other intangible property of certain corporations, held that the provision of the section deducting the total amount of indebtedness of a corporation from the value of its stock was unconstitutional and void, but that the same did not invalidate the remaining part of the Act. The court says, in part: "Again, while it cannot be denied that the legislature intended the provision for deducting the indebtedness from the value of the capital stock to be a part of the system of listing and assessing the property of these corporations, * * * yet this provision is easily separable from other provisions of this section. What would remain would constitute a complete system of taxation, fully capable of being executed in accordance with what we think was the apparent legislative intent. The fact that this void provision is in the same section with other provisions is not important, for the distribution into sections is purely arbitrary. The test is, rather, whether the provisions are so essentially and inseparably connected and interdependent that the one may not operate without the other, or that it is impossible to suppose that the legislature would have passed the one without the other. There is no such essential and inseparable connection

or interdependency in this case. The other provisions will operate, and can be executed, with this invalid provision stricken out. Neither is there anything to justify a court in holding that the legislature would not have enacted the statute with this obnoxious provision omitted. The evident intention was to reach for taxation the franchises and other intangible property of these corporations and associations as effectually and completely as possible."

We also cite the following cases where revenue laws have been held valid after the unconstitutional provisions attempting to exempt certain property from taxation were eliminated: *People v. McCreery*, 34 Cal. 432; *People v. Whyler*, 41 Cal. 351; *City of Dubuque v. C. D. & M. R. Co.*, 47 Iowa, 216.

It is a fundamental rule that a reasonable doubt as to the constitutionality of a statute will be resolved in favor of its validity, and that the judiciary will not declare an Act of the legislature unconstitutional unless it is clear that such Act is inhibited by the fundamental law. (*University of California v. Bernard*, 57 Cal. 612; *Young v. City*, 24 Utah, 321, 67 Pac. 1066; *State ex rel. Cornell v. Poynter*, *supra*; *Western Ranches v. Custer County*, 28 Mont. 278, 72 Pac. 659.) This section was incorporated in the general codification of the laws adopted in 1895, and it is reasonable to infer that it did not receive that specific consideration it would have received, had it been a part of a separate bill. Certainly no inference can be entertained that the legislature intended to enact a provision inhibited by the Constitution, nor can it be maintained that an excessive tax has been imposed or levied on one class of property as an inducement for the exemption of another class, for the reason that no such authority is given or recognized by the Constitution, and for the further reason that in this case no excessive tax is imposed or levied. This property is taxed "at the same rate that other personal property is taxed." The conclusion reached is that the part of Section 681 of the Civil Code providing for a tax "upon the excess of premiums received over losses and ordinary expenses incurred within the state" is not

rendered inapplicable to foreign mutual life insurance companies, unconstitutional, nor void, by reason of the unconstitutionality of that part of the same section exempting other property from taxation.

The other queries enumerated in the transcript are not discussed in the briefs, and are not noticed therein, except to be waived by appellant by reason of the decision in *Mutual Life Insurance Co. v. Martien*, 27 Mont. 437, 71 Pac. 470, decided since the commencement of this action.

The county of Lewis and Clarke being made the party defendant by stipulation, we have assumed, without deciding, that it is the proper party against whom the action should have been brought.

Under the views herein expressed, we are of the opinion that, omitting the last sentence, Section 681 of the Civil Code is constitutional, has not been repealed, and does apply to foreign mutual life insurance companies doing business in this state. But the right to enforce the collection of this tax *at the time* this suit was commenced was dependent on the authority conferred by Section 3940 of the Political Code; and, as this section has been declared unconstitutional in the case above cited, it follows that there was no authority vested in any officer or party in the county where the suit was instituted to collect this tax *at that time*, and that under the agreed case the plaintiff was entitled to a judgment in its favor for its costs.

We recommend that the cause be remanded, with directions to the district court to modify the judgment in accordance with the views herein expressed, and, when so modified, that it be affirmed.

PER CURIAM.—For the reasons given in the foregoing opinion, it is ordered that this cause be remanded to the district court, with directions to enter judgment in accordance with the views therein expressed, and, upon the entry of the judgment as modified, the judgment appealed from be affirmed.

MR. JUSTICE MILBURN: I concur; but I do not agree with all that is said as to the intention of the legislature at the time it passed the said Section 681. I am not convinced that the legislature was not induced to put the income tax provided for in said section upon the companies in consideration of their being made "subject to no other taxation under the laws of this state, except taxes on real estate and the fees imposed by law." I am in doubt, and I think reasonable, as to whether the unconstitutional sentence was the inducement for the taxing of the income; that is, "the excess of premiums received over losses and ordinary expenses," etc. Having such a doubt, I do not hold the statute unconstitutional. (*Young v. Salt Lake City*, 24 Utah, 321, 67 Pac. 1066, citing many cases; *People ex rel. Robertson v. Van Gaskin*, 5 Mont. 352, 6 Pac. 30.)

Rehearing denied October 9, 1903.

LAWRENCE, RESPONDENT, v. WESTLAKE ET AL., DEFENDANTS; ANNA M. WESTLAKE, APPELLANT.

28 503
31 335

(No. 1,631.)

(Submitted July 13, 1903. Decided July 18, 1903.)

Trial—Instructions — Assuming Disputed Facts—Weight of Evidence—Error—Presumption of Prejudice—Misleading Instructions.

- 1 In an action against alleged copartners on an account stated, etc., where the answer of any one of the defendants denied the existence of any partnership, and also denied that plaintiff ever sold any goods to any copartnership of which said defendant was a member, and the evidence was in irreconcilable conflict on both issues, an instruction that in such cases as the one at bar, where an action is brought by a third person against a firm, less strictness of proof is required to show that a certain person was a copartner than is required in an action by one partner against another, was error for assuming the existence both of a partnership and of a partnership liability.

2. Under Code of Civil Procedure, Section 3390, which requires the judge on all proper occasions to charge the jury "that in civil cases the affirmative of the issue must be proved, and when the evidence is contradictory the decision must be made according to the preponderance of the evidence," it was error to charge that, in actions against a firm by a third person, less strictness of proof was required to show partnership than is required in an action brought by one partner against another, preponderance of the evidence being required in both cases.
3. Error being apparent, prejudice will be presumed.
4. An instruction that "a partnership may be shown by the separate admission, acts, declarations, or conduct of the parties, or by the acts of one, the declarations of another, and the acknowledgment or consent of a third," standing alone, is liable to mislead.

Appeal from District Court, Silver Bow County; John Lindsay, Judge.

ACTION by David Lawrence against Edward Westlake, A. W. Gratton, and Anna M. Westlake. Judgment for plaintiff. From an order denying a new trial, defendant Anna M. Westlake appeals. Reversed.

STATEMENT OF THE CASE.

This action was commenced by the plaintiff, Lawrence, to recover the sum of \$397.79 from the defendants, A. W. Gratton, Edward Westlake and Anna M. Westlake, on an account stated for goods, wares and merchandise sold and delivered to, and for money paid for the use and benefit of, such defendants between May, 1895, and January 1, 1896.

It is alleged that the defendants were copartners, constituting a mining partnership. The complaint then alleges: "That thereafter, on or about the first day of January, 1896, at Butte, Montana, an account was stated between the plaintiff and the said defendants, and upon such statement a balance of three hundred and ninety-seven and 79-100 dollars (\$397.79) was found due the plaintiff from the said defendants."

The defendants Gratton and Edward Westlake made default. The defendant Anna M. Westlake answered, denying that she was ever associated with the defendants Gratton and Edward Westlake, or with either of them, as a copartner, or in working any mine or procuring any goods, or in transacting any busi-

ness mentioned in the complaint. The answer further denies that the plaintiff ever sold any goods to, or paid any money for, or that any account was ever stated with, or any amount ever found due from, any copartnership of which the answering defendant was a member.

Upon the trial the court gave the following instructions:

"No. 14. You are instructed that in such cases as the one at bar, where an action is brought by a third person against a copartnership to enforce a copartnership liability, less strictness of proof is required to show that a certain person was a copartner than is required to show partnership in cases brought by one partner against another."

"No. 15. You are instructed that a partnership may be shown by the separate admissions, acts, declarations, or conduct of the parties, or by the acts of one, the declarations of another, and the acknowledgment or consent of a third."

The jury returned a verdict in favor of the plaintiff for \$201.98. From the order denying a new trial, the answering defendant appeals.

Messrs. McBride & McBride, for Appellant.

Mr. Edwin S. Booth, and *Mr. Chas. G. Kohl*, for Respondent.

MR. JUSTICE HOLLOWAY, after stating the case, delivered the opinion of the court.

Instruction No. 14 above is fatally defective.

1. The jury is told that this is an action brought by a third person against a copartnership to enforce a copartnership liability. One of the principal issues raised by the pleadings, and upon which the evidence is in irreconcilable conflict, was whether or not a copartnership of which the answering defendant was a member had any existence in fact, and, if so, whether there was any copartnership liability, and, notwithstanding this issue, both questions are determined by the court in its in-

structions, leaving the jury practically nothing to decide. The court ought not to assume the existence of a disputed state of facts.

In *Territory v. Scott*, 7 Mont. 407, 17 Pac. 627, this court said: "Where the evidence is clear and conclusive as to the existence of the particular fact, and there is no evidence to the contrary, or where facts are admitted, an instruction assuming such facts as true will not work a reversal of the judgment; but if there is the least conflict in the evidence, or if the evidence is in any wise of a doubtful character, such ruling will be held erroneous. *Caldwell v. Stephens*, 57 Mo. 589-595; *Barr v. Armstrong*, 56 Mo. 577-588." The rule is the same in civil as in criminal actions. (*Collier v. Fitzpatrick*, 19 Mont. 562, 48 Pac. 1103; *Butte & Boston Mining Co. v. Societe Anonyme Des Mines De Lexington*, 23 Mont. 177, 58 Pac. 111, 75 Am. St. Rep. 505.)

2. The Code establishes the law of this state respecting the subjects to which it relates. (Political Code, Sec. 4.) Section 3390, Code of Civil Procedure, among other things, provides: "The jury subject to the control of the court in the cases specified in this Code, are the judges of the effect or value of evidence addressed to them, except when it is declared to be conclusive. They are, however, to be instructed by the court on all proper occasions: * * * (5) That in civil cases the affirmative of the issue must be proved, and when the evidence is contradictory the decision must be made according to the preponderance of the evidence. * * *"

This section, then, is conclusive upon the *quantum* of evidence required in all such cases, whether it be an action by a third party against a copartnership, or by one partner against another, and the court was entirely wrong in saying that a different rule applies in one case from that in the other.

In an action by one partner against another, the utmost that can be required of the plaintiff is that he show by a fair preponderance of the evidence that the defendant is a member of the copartnership, and in an action by a third party against a

copartnership nothing less will suffice. The rule is the same in either instance, and the instruction given could hardly fail to mislead the jury to the prejudice of the answering defendant. In any event, error being apparent, prejudice will be presumed. (*State v. Mason*, 24 Mont. 340, 61 Pac. 861; *Parrin v. Montana Central Ry. Co.*, 22 Mont. 290, 56 Pac. 315.)

As this cause must be reversed, attention is directed to instruction No. 15, *supra*. While the instruction, if rightfully understood, correctly states a legal principle, yet, standing alone, it is likely to be misunderstood by a jury, and should not be given without explanation or elucidation. Instruction No. 16, given, repeats one of the errors found in instruction No. 14.

We do not consider the question as to whether the complaint states a cause of action, or the question as to whether the evidence is sufficient to show that an account was ever stated. This latter question, though involved in one of the assignments of error, is not presented by appellant in her brief.

The order appealed from is reversed, and the cause remanded with directions to the lower court to grant the answering defendant a new trial.

1
Reversed and remanded.

DOTY, APPELLANT, v. McCLUSKY ET AL., DEFENDANTS;
GRIFFIN, INTERVENER AND RESPONDENT.

(No. 1,650.)

(Submitted July 17, 1903. Decided July 20, 1903.)

Appeal—Insufficient Record—Dismissal.

On appeal by plaintiff from a judgment for intervener, where neither the order striking out plaintiff's answer to the complaint in intervention, nor the one refusing him leave to file an answer, nor the one granting intervener's motion for judgment on the pleading, was in the record, alleged errors therein could not be reviewed.

Appeal from District Court, Jefferson County; M. H. Parker, Judge.

ACTION by James H. Doty against James McClusky and others. Daniel Griffin intervened. From a judgment in favor of intervener, plaintiff appeals. Dismissed.

Mr. George F. Cowan, and Mr. T. T. Lyon, for Appellant.

Mr. C. F. Kelley, and Mr. C. P. Connolly, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Plaintiff brought this action to compel the defendant McClusky to execute to him a deed to an undivided one-fourth interest in the Blue Bell quartz lode mining claim, situate in Jefferson county, to supply the place of a prior deed which had been lost before record. The defendants, Madsen, Christopherson and Deitch, are alleged to be lessees of the plaintiff, and one John T. Murphy the owner of another interest in the claim, and were made parties defendant for the purpose of having them enjoined from paying to Murphy and McClusky royalties upon the ores extracted by them pending final judgment, which it is alleged they were doing when the action was commenced. Murphy is not a party. Griffin was permitted to intervene, and filed his complaint, denying the execution of the deed to plaintiff, and setting up title in himself to the interest in controversy, under a deed executed and delivered to him by McClusky. The plaintiff has appealed from a judgment in favor of the intervener.

The record is very imperfect. The plaintiff relies for a reversal of the judgment upon alleged errors of the court in striking out his answer to the complaint in intervention, and subsequently, and upon an application for that purpose, refusing him leave to file an answer, and rendering judgment in favor of the intervener, after denying plaintiff a trial upon the issues arising.

ing upon the allegations of his complaint and the denials thereof in the complaint of intervention.

If we could look to the statements of counsel in oral argument and in their briefs for information as to what transpired during the proceedings in the district court, we should say that the judgment is undoubtedly void. The record, however, presents nothing of which this court can take notice. It does not contain copies of the orders showing the action taken by the district court in respect of any of the matters of which the appellant complains. Neither the order striking out plaintiff's answer, nor the one denying him the right to file an answer, nor the one sustaining the defendant's motion for judgment on the pleadings, is found in the record. This court cannot, therefore, consider them, or undertake to revise the action of the court thereon. The appeal is therefore dismissed.

Dismissed.

COOK & WOLDSON, RESPONDENTS, v. GALLATIN RAIL-
ROAD COMPANY, APPELLANT.

(No. 1,557.)

(Submitted April 30, 1903. Decided July 20, 1903.)

*Quantum Meruit—Special Contract—Breach—Right to Sue—
Pleading — Replication — Judgment — Evidence — Bill of
Particulars—Question for Jury—Instructions.*

1. Plaintiffs sued defendant on a *quantum meruit* for services rendered in delivering certain ties. Defendant denied liability on the ground that the ties were delivered under a contract in writing with which it was alleged plaintiffs had not complied, and plaintiffs by replication admitted that there was a contract in writing, but denied that it contained the entire agreement or that defendant had performed its obligations, and alleged a separate agreement by which plaintiffs were to receive extra pay for hauling ties a greater distance than that provided for in the contract. *Held*, that the allegations of the replication were a mere explanation of plaintiffs' denial of the answer, and not a statement of a new cause of action entitling defendant to judgment on the pleadings.

- 2 Where plaintiffs contracted in writing to haul and distribute along defendant's railroad 40,000 ties, for which plaintiffs were to be paid on the 15th of each month, and defendant failed to make payment for hauling as required, plaintiffs were entitled to refuse to make further deliveries, and sue at once on a *quantum meruit* for ties delivered.
3. Where, in a suit on a *quantum meruit* for hauling ties, defendant claimed that the ties were delivered under an express contract which plaintiffs had not performed, and plaintiffs by replication admitted the making of such contract, but alleged that defendant had broken the same and that it was subsequently agreed that plaintiffs should receive extra pay for hauling ties an extra distance, evidence as to the number of ties hauled beyond the limit was not objectionable on the ground that the only contract pleaded in the complaint was the written contract referred to in the answer.
4. Where suit was brought on a *quantum meruit* for ties delivered under a written contract which defendant had broken, evidence that plaintiffs had not hauled all of the ties required by such written contract was properly excluded.
5. Where, in an action on a *quantum meruit* for hauling railroad ties, defendant set up damages for delay and interruption of track laying, etc., particularly averring the year, month, and days, on which the delays occurred, questions asked in support of such counterclaim, not referring to the dates specified, were properly excluded.
6. In an action for services in delivering ties to a railroad company, defendant was not entitled to recover, by way of counterclaim, damages for delays alleged to have occurred after the suit was commenced.
- 7 Where, in an action to recover the wages of a watchman appointed to guard a certain railroad camp, the evidence would have warranted a finding that defendant's vice president and general manager had never agreed to pay for the watchman, and there was nothing to show how many days the watchman worked, etc., whether the amount sued for was a reasonable and proper allowance for his services was for the jury, and it was therefore error for the court to charge that if the jury believed the plaintiffs' evidence their verdict should be for the plaintiffs in the amount sued for, and if they did not believe plaintiffs' evidence they should find for defendant.

MR. JUSTICE HOLLOWAY dissenting.

Appeal from District Court, Gallatin County; F. K. Armstrong, Judge.

ACTION by Cook & Woldson, copartners, against the Gallatin Railroad Company. From a judgment in favor of plaintiffs, and from an order denying a motion for a new trial, defendant appeals. Reversed in part.

STATEMENT OF THE CASE.

This cause is on appeal from the judgment in favor of the plaintiffs, and from an order denying a motion for a new trial. Plaintiffs sought to recover on each of four causes of action.

Only the first and fourth causes of action are before us, as the plaintiffs accepted the amount admitted by the defendant to be due on the second cause, and the full amount demanded on the third cause of action was confessed. The action on the first cause was for \$2,302.50, alleged to be the reasonable value of services rendered in hauling ties for the defendant between November 1, 1898, and December 31, 1898. On the fourth cause of action plaintiffs sued for \$31.50 for services of a watchman, which sum defendant was alleged to have promised to pay.

A demurrer to each cause of action for want of substance was overruled. Defendant filed an amended and supplemental answer, setting up, as to the first cause of action, that plaintiffs hauled 21,809 ties under a contract in writing, which we gather from the answer was intended to cover the delivery of about 40,000 ties. The defense was that the express contract provided for delivering and distributing along defendant's track enough ties to "half-tie" and "full-tie" between certain "stations" respectively, and that plaintiffs had not done so, and that defendant, by reason of the failure of plaintiffs to haul and deliver the ties, had been delayed and damaged in the sum of \$219.93 by delay of locomotive and crew used in picking up and distributing ties, and the further sum of \$10,000 for loss of earnings which it could and would have made if the road had been finished in time. The hauling was to be paid for at the rate of ten cents per tie, and "estimated to be put in on the first and payments on the 15th of each month." Defendant denied all the allegations of the complaint as to the fourth cause of action. Defendant averred that there was not any other agreement for hauling ties. The replication admitted the making of the contract in writing, and denied "that there never was any other contract for the hauling * * * of any ties by plaintiffs for the defendant, but, on the contrary, allege that after the execution and delivery of said written contract the defendant * * * agreed * * * to allow them for hauling ties a greater distance than was provided for * * *

in said contract," and, further replying, alleged that they had complied with all and singular the terms of said express contract, and had delivered and distributed the ties in accordance with the terms thereof.

Judgment on the pleadings as to the first cause of action was prayed for and denied, and the cause was tried before the court sitting with a jury. Evidence was introduced by plaintiffs, over objection of defendant, tending to show that they had hauled 1,216 ties an extra distance, for which they claimed compensation at the rate of 20 cents per tie. The court, sustaining the objection of the plaintiffs, refused to allow the defendant to show, by cross-examination or otherwise, that the contract had not been fully completed by the plaintiffs according to the terms thereof, for that the suit was on a *quantum meruit*, and not upon the express contract, and it was admitted by all parties that all the ties required by the contract to be delivered had not been hauled and distributed. The court excluded testimony offered by the defendant upon its first counterclaim above, and excluded testimony in support of the second counterclaim. Judgment was entered for the amount of the verdict in favor of the plaintiffs, to-wit, in the sum of \$2,807.20, the jury having allowed the plaintiffs the full amount claimed on the first and fourth causes of action, and the amounts admitted by defendant to have been due on the second and third causes. There was not any point made in the court below as to the verdict, and there has not been any such point made on appeal.

Mr. John A. Luce, for Appellant.

The motion for judgment on the pleadings should have been sustained, after the admission that the work was done under the written contract as set up in the answer, for three reasons: (1) That if said contract was an entire contract no action could be brought thereon upon a *quantum meruit* unless it had been fully completed, or the contract had been abandoned, rescinded or

extinguished by some act of the defendant. (Greenleaf on Evidence, Vol. 2, Sec. 104; *Clark v. Smith*, 14 Johnson, 326; *Dermott v. Jones*, 2 Wall. 1 Opin. 9; *Cutter v. Powell*, 2d Smith's Leading Cases, 1, and notes.) (2) If the contract was not entire no action could be brought for a partial performance thereof, but the action should have been upon the contract itself. (Note to *Cutter v. Powell*, 2 Smith's Leading Cases, p. 62.) (3) There was no allegation that any estimates were ever put in as provided in the contract.

The object of the contract being to haul all the ties, about 40,000, it was an entire contract. (*Catlin v. Tobias*, 26 N. Y. 217.)

It was incumbent upon plaintiffs before they could recover upon *quantum meruit* to show that nothing remained to be done under the contract except for the defendant to pay the price agreed upon and that they had complied with the terms of the contract upon their part. There was no breach until completion and the plaintiffs could not maintain their action. (*Krumb v. Campbell*, 102 Cal. 370; *McGonigle v. Klein*, 40 Pac. 465; *Jackson v. Cleveland*, 15 Wis. 107; *Mount v. Lyon*, 49 N. Y. 552; *Jones v. U. S.*, 96 U. S. 24, and see cases above cited.)

It is the rule that as to an act raising a legal right or that amounts to a legal wrong or embraces a legal duty, or constitutes a tort or a crime, it is not necessary to prove the date alleged. (*Holman v. Pleasant Grove City*, 8 Utah, 78-81; *Lake Shore, etc. R. R. Co. v. Hundt*, 140 Ill. 525.) So an averment that a jennet was killed April 19, 1886, was sustained by proof that the jennet was killed April 29, 1889. (*St. Louis, etc. R. R. Co. v. Evans*, 78 Tex. 369; *Lasater v. Van Hook*, 77 Tex. 650.) It has been held that in an allegation of title a prior beginning can be shown. (*Russell v. Bradley*, 47 Kan. 438.) It is the general rule that allegations of value, place, time and amount need not be strictly proved. (See, in addition to the above authorities, *Brown v. Sullivan*, 71 Tex. 470; *McCaslin*

v. *Lake Shore, etc. R. R. Co.*, 93 Mich. 553; *Rockford v. Hollinbeck*, 34 Ill. App. 40.)

The defendant should have been allowed to prove its counterclaim for damages arising out of the failure of plaintiffs to complete their contract and for delays caused thereby in direct violation of the terms of the contract. (Civil Code, Sec. 4272; Sutherland on Damages, Vol. 1, page 187; *Hicks v. Herring*, 17 Cal. 566; *Williams v. Missouri F. Co.*, 13 Mo. App. 74; Greenleaf on Evidence, 268.)

Messrs. Hartman & Hartman, and *Mr. M. S. Gunn*, for Respondents.

"The objection, that the common counts are inconsistent with the provision of the Code that a complaint must state facts constituting a cause of action in ordinary and concise language, and are therefore insufficient, is not tenable." (*Pleasant v. Samuels* (Cal.), 45 Pac. 998; *Hosley v. Black*, 28 N. Y. 438; *Nyhart v. Pennington* (Mont.), 50 Pac. 413; *Castagnino v. Balletta*, 82 Cal. 250; *Farron v. Sherwood*, 17 N. Y. 227; *Galvin v. MacM. & M. Co.*, 14 Mont. 508.)

Where labor has been performed or work done under a special contract which has been fully executed by the plaintiff, and the time for payment is past, a recovery may be had on a *quantum meruit*. (*Farron v. Sherwood*, 17 N. Y. 227; *Stuckey v. Hardy*, 41 N. E. 606; *Shepard v. Mills*, 50 N. E. 709; *Moore v. Mfg. Co.*, 20 S. W. 975; *Castagnino v. Balletta*, 82 Cal. 250; *Electric Co. v. Berg*, 30 S. W. 454; *Higgins v. Railroad Co.*, 66 N. Y. 604; *Railroad Co. v. Donovan*, 65 N. W. 583; *Devecmon v. Shaw*, 9 Am. St. Rep. 422; *Ludlow v. Dole*, 62 N. Y. 617; *Gambril v. Schooley*, 43 Atl. 918; *Ingle v. Jones*, 2 Wall. 1; Note to *Cutter v. Powell*, 2 Smith's Leading Cases, 41.)

Where a person performs work and labor for another under a special contract, but not within the time or in the manner stipulated, he cannot recover upon the contract, because he has departed from it; but he may recover upon a *quantum meruit*,

provided the work and labor performed was beneficial to the other party and was accepted and enjoyed by him. (*Elevator Co. v. Clark*, 80 Fed. 705; *Bedow v. Tonkin*, 59 N. W. 222; *Deposit Co. v. Burke*, 88 Fed. 630; *Gastlin v. Weeks*, 28 N. E. 331; *Gove v. Milling Co.*, 24 Pac. 521; *Standard Gas Light Co. v. Wood*, 61 Fed. 74; *Ingle v. Jones*, 2 Wall. 1.)

The contract was not entire, but was divisible. (*Perkins v. Hart*, 11 Wheaton, 237; *Broumel v. Rayner*, 11 Atl. 833; *Taylor v. Laird*, 1 Hurl. & N. 274; Note to *Cutter v. Powell*, 2 Smith's Leading Cases, 45; *Sickels v. Patterson*, 14 Wend. 267.)

Plaintiffs having elected to bring their action upon the *quantum meruit*, it was not necessary to allege that an estimate was put in, even though this was a condition precedent to the right to payment. Proof of the estimate was admissible under the allegations of the complaint. (*Elevator Co. v. Clark*, 80 Fed. 705; *Higgins v. Railroad Co.*, 66 N. Y. 604; *Castagnino v. Balletta*, 82 Cal. 250.)

The first cause of action stated in the complaint is not defective because it is not alleged therein that any estimate was put in as provided by the contract. (*Johnson v. Warian*, 15 N. E. 413; *Porter v. Swan*, 35 N. Y. Supp. 1057.)

If the plaintiffs performed the contract, the price fixed therein is the measure of the recovery for hauling the said 20,593 ties. (*Swartzel v. Karnes*, 44 Pac. 41; *Ingle v. Jones*, 2 Wall. 1; *Perkins v. Hart*, 11 Wheat. 237; *Ludlow v. Dole*, 62 N. Y. 617; *Shepard v. Mills*, 50 N. E. 709; *Electric Co. v. Berg*, 30 S. W. 454; *Higgins v. R. R. Co.*, 66 N. Y. 604; *Gambrill v. Schooley*, 43 Atl. 918; Note to *Cutter v. Powell*, 2 Smith's Leading Cases, 41.)

If, however, the plaintiffs did not comply with the terms of the contract, as the work performed was beneficial to the defendant and was accepted and enjoyed by it, the plaintiffs were entitled to recover the reasonable value of the work and labor performed without regard to the contract price. (*Bedow v.*

Tonkin, 59 N. W. 222; *Deposit Co. v. Burke*, 88 Fed. 630; *Gove v. Milling Co.*, 24 Pac. 521; *Gastlin v. Weeks*, 28 N. E. 331; *Standard Gas Light Co. v. Wood*, 61 Fed. 74.)

The counterclaim is in effect a bill of particulars. It was probably unnecessary to itemize, specify and particularize as was done in this counterclaim. The defendant, however, having adopted this form of pleading, was properly confined in its proof to the particular delays complained of. (*Matthews v. Hubbard*, 47 N. Y. 428; 3 Ency. Pl. & Pr. p. 539; *Tourgee v. Rose*, 37 Atl. 9; *Wilkinson v. Railroad Co.*, 17 So. 71; *City of Seattle v. Parker*, 43 Pac. 369; *Quinn v. Astor*, 2 Wend. 577.)

The court was fully justified in refusing each and every request made by the defendant, because they were not signed as required by the statute. See Sec. 1080, Subd. 7, Code Civ. Proc. It is held generally in states having a statute similar to the provision referred to that it is not error for the court to refuse a request where it is not signed by counsel. (*Choen v. Porter*, 66 Ind. 194; *Darnell v. Sallee*, 34 N. E. 1020; *Bank v. Bennett*, 36 N. E. 551; *Ry. Co. v. Mitchell*, 26 S. W. 154; *Redus v. Burnett*, 59 Tex. 581; *Ry. Co. v. Hobbs*, 43 N. E. 479; *Schoolfield v. Houle*, 13 Col. 394; 11 Ency. Pl. & Pr. 270.)

MR. JUSTICE MILBURN, after stating the case, delivered the opinion of the court.

1. The first alleged error assigned is the action of the court in overruling the defendant's motion for judgment on the pleadings. We do not think that the court erred in this behalf. The motion was directed to the first cause of action only, and was upon two grounds: (1) That under a contract in writing plaintiffs had agreed to haul and distribute 40,000 ties, and that the pleadings showed that they had not been hauled; and (2) that the pleadings showed that there was not anything due from defendant to plaintiffs.

Reference to the pleadings discloses that the suit was on a *quantum meruit* for services rendered by plaintiffs to defendant. Plaintiffs admitted in their replication that there was a contract in writing, but denied that defendant at all performed its obligations thereunder, and alleged that there was another and separate agreement made between plaintiffs and defendant, by the terms of which plaintiffs were to receive extra pay for hauling ties to a greater distance than was provided for in the written instrument. This fact alone would be sufficient to justify the action of the court in denying the motion for judgment on the pleadings. It is said by appellant that the cause of action for the extra hauling could not be set up for the first time in the replication. Certainly the plaintiffs could not state their case in chief in the replication, but we do not understand that the plaintiffs did anything else than explain their denial of the allegation in the answer that there never had been any other agreement between the plaintiffs and the defendant than the one evidenced by a certain letter referred to in the answer as stating the contract. If defendant desired to attack plaintiffs' complaint for declaring, as it supposed, in one count on a *quantum meruit* on two separate causes of action, to-wit, for the hauling of ties under the express contract and for extra services not provided for in said letter, the proper step was not by motion for judgment on the pleadings.

Both of the reasons given in the motion seem to be predicated upon the idea that the contract was an entire one, and that it was necessary for plaintiffs to allege that they had hauled and distributed 40,000 ties before they could recover anything at all. This is not so. If there was in fact a failure to pay on the 15th of any one month, and the plaintiffs had hauled and distributed ties as they were expected to do under the terms of the contract, they would not have to continue hauling until the end of the term of the contract and wait till then for their money. There is nothing said in the pleadings about the failure to render an estimate. The answer sets forth the particulars wherein the

plaintiffs had failed to perform, but does not say that there had been any failure on the part of any one to furnish such statement. It is not claimed in the answer that any payment was ever made to the plaintiffs.

It does not seem to be necessary to quote or cite authorities to support the statement that plaintiffs, if they performed as above suggested, did not have to wait until the end of the term, but could sue on default of monthly payment and bring their action on a *quantum meruit*. (See note to *Cutter v. Powell*, 2 Smith's Leading Cases, at page 55; *Broumel v. Rayner*, 68 Md. 47, 11 Atl. 833; *Perkins v. Hart*, 11 Wheat. 237, 6 L. Ed. 463.) The opinion in *Riddell v. Peck-Williamson Heating & Ventilating Co.*, 27 Mont. 44, 69 Pac. 241, cited by appellant, does not contain anything opposed to the views expressed above, but, on the contrary, there is a statement therein that "if payments were to be made, * * * then a cause of action accrued as soon as the defendant failed to make a payment when it should have been made. Default in making such payment would have entitled the plaintiffs, if they continued to perform under the contract, to recover judgment for the price of the work already done; or such default would have warranted them in treating the special contract as at an end, and authorized them to maintain an action on the implied promise of the defendant to pay the reasonable worth of the labor done and materials furnished. They could, at their option, have pursued either course." So, in the case before us, the plaintiffs, if the defendant failed to pay, could have kept on working under the contract, and sued thereunder for the fixed value of their services, with a second count for the value of extra services; or they could adopt the course which they did, treating the special contract as at an end and suing on a *quantum meruit*.

The complaint counts upon the hauling and distributing of ties up to and including December 31st, and alleges nonpayment therefor, the suit having been commenced after January 15th. As we have said, the answer does not allege, among other things,

which defendant therein says that the plaintiffs failed to do, that the plaintiffs were to furnish and did fail to furnish estimates. We do not find the court in error in overruling said motion for judgment on the pleadings.

2. The second assignment is that it was error for the court to overrule the objection of the defendant to the testimony of Martin Woldson as to 1,216 ties hauled beyond the limit. The ground of objection was that there was no allegation in the complaint supporting such testimony, and that there is but one contract pleaded in the complaint, to-wit, an implied contract; and plaintiffs admit the execution of a written contract set out in the answer, and that no testimony could be admitted outside of such express contract, and that the only allegation in plaintiffs' pleadings in respect of the hauling of ties beyond the limit is an allegation in the replication, which defendant says is a complete departure from the complaint. What we have already said applies to this assignment, and we do not find that the court erred. The same may be said of assignments 3 and 4.

3. In assignment No. 5 it is said that the court erred in permitting the witness Cook to testify as to the reasonable value of the hauling of the 21,809 ties. The reason assigned in the argument in the brief is that the plaintiffs could not sue on a *quantum meruit*, and, in any event, the contract price—ten cents—was the measure of damages. Referring to what we have said above in Section 1, and the further fact, disclosed by the record, that the witness testified that ten cents, the contract price, was the reasonable worth, except as to the 1,216 hauled beyond the point fixed by the contract, we cannot see that the court erred in permitting the testimony to be introduced.

4. Although assignment 6 is a merger, embracing three alleged errors not specially numbered as the rule requires, still we take it up with assignment No. 7. The point relied upon in each is that the court erred in not allowing defendant to prove that the work had not all been done; that is, all the ties had not been hauled. This was admitted by all parties, and there could

not be any error in the court cutting off proof to show what had already been admitted. Plaintiffs only claimed that 21,809 ties had been hauled. Each of these assignments is made and argued upon the presumption that the plaintiffs had failed to execute completely the contract on their side before suing to recover anything. We cannot say that the court erred as alleged in the sixth and seventh assignments. These remarks are applicable also to assignment No. 10.

5. Assignment No. 8 is that it was error for the court to exclude (1) the testimony of the witness Signor in reference to the defendant's first counterclaim, (2) to sustain the objection of the plaintiffs thereto, and (3) to reject the offer of proof made by the defendant. The reference to the transcript covers from line 5, page 49, to line 15, page 51. This assignment is an assembling of more than one alleged error in one assignment. At least one of the questions refers to the approach to "Hoffman's Mine," possibly mentioned in the question with reference to the second counterclaim, and not referred to in the contract as a place towards which ties should be carried. Suffice it to say that not a single date is given in any one of the questions asked and objected to, except in one, wherein it was asked if there had not been an interruption of track-laying on or about the 21st day of December, whereas the month of December is not mentioned in the answer in the statement of the first counterclaim, in which statement are set forth particularly the different days upon which loss is alleged to have occurred by the delay of the plaintiffs. The items upon which the damages for delay are based in the first counterclaim are set forth with great particularity as to year, month, day, hours, men, teams, locomotives, etc. It was not error for the court to refuse to allow so wide a departure from the bill of particulars contained in the answer. After careful consideration of the questions, so far as we can determine which of them apply to the first counterclaim, we conclude that the court did not err as alleged.

6. As to assignments 9 and 16, we need only say that all of the evidence offered and excluded referred to the second counter-

claim, in which defendant sought to recover for damages alleged to have occurred to it after the suit was commenced, and it was not error for the court to exclude it.

7. We have carefully considered the points raised by appellant's assignments numbered 11, 12, 13 and 14, as to instructions asked for by the defendant and refused by the court, and assignment No. 17, as to an instruction given, and we do not find that the court erred as alleged.

8. It was error, as declared in assignment No. 15, for the court to give instruction numbered 8. The instruction was in relation to plaintiffs' fourth cause of action for the sum of \$31.50, wages of a watchman. In it the court told the jury that if they believed the testimony in regard to that item their verdict should be for the plaintiffs in the sum of \$31.50 and interest, and, if they did not believe the testimony of plaintiffs, then they should find for the defendant as to this cause of action. The giving of this instruction is assigned as error, and we think correctly so. To believe what a witness says is one thing, and to find a fact from the evidence given by such witness is another. It was for the jury to determine from the evidence how much, if anything, the plaintiffs should recover. The evidence is very meager as to this matter of the hiring of a watchman. Mr. Cook, one of the plaintiffs, testified that Mr. Wiswell, the superintendent of construction, wanted to rent a certain camp belonging to the plaintiffs; that Mr. Hall, the vice president and general manager of the defendant, was not present, but that Mr. Wiswell wished plaintiffs to leave the camp for the company's use; that plaintiff Cook then said that, if the camp were left for the company's use, he (Wiswell) would have to pay for a watchman; that Wiswell said that would be all right, Hall would fix that; that upon a demand for the rent he (Wiswell) would not O. K. the bill. Cook did not remember the number of days the watchman was there, but he paid him \$31.50 for the time he was there after the talk with Wiswell. Upon cross-examination he said that Wiswell was not positive that they would want the camp, and he would like to have it left

there until Mr. Hall came back. Mr. Hall afterwards rented the camp, used it, and paid rent therefor. Hall never agreed to pay for a watchman; he (Cook) had no conversation with any one except Mr. Wiswell; Wiswell told witness that he did not know whether Hall would want the camp or not, but that he was almost positive that they would. Witness said he knew that the company or its general manager, Hall, authorized Wiswell to hire a watchman there, because he was permitted to make deals of that kind all the time.

It is sufficient to say, in respect of this instruction, that there is nothing in the evidence to show how many days the watchman was there, and, if anything was owing under such evidence, it certainly was for the jury to say whether \$31.50 was a reasonable and proper amount to pay for his services, and it was not for the court to direct a verdict of \$31.50, even if the jury did believe all that Mr. Cook said upon the subject. A motion for a nonsuit upon such evidence upon this cause of action, if it had been made, ought to have been granted.

For the reasons stated above, the order denying the motion for a new trial and the judgment are affirmed as to the first, second and third causes of action, and reversed as to the fourth cause of action, as to which fourth cause of action the cause is remanded for a new trial.

MR. JUSTICE HOLLOWAY: I dissent. I particularly disagree with the order remanding the cause for a new trial as to the fourth cause of action only. I am of the opinion that the entire cause should be retried, for, while the complaint contains four distinct causes of action, the jury found for the plaintiffs in a gross sum, without determining the amount which they should recover on each cause of action separately. For this reason, I believe the verdict entirely insufficient. (22 Enc. Pl. & Pr. 850, and cases cited.) The cause is remanded for a new trial upon the fourth cause of action, and, if upon a second trial the jury should return a verdict for a sum less than the amount claimed, I am of the opinion that the district court

would be unable intelligently to properly modify the existing judgment, for the reason that it could not determine whether the verdict upon a second trial was for a greater or less amount than the verdict on that cause of action on the first trial.

CORBY, RESPONDENT, v. ABBOTT, APPELLANT.

(No. 1,643.)

(Submitted July 16, 1903. Decided July 20, 1903.)

Judgment by Consent—Appeal.

1. Judgment entered on the stipulation of the parties is in fact a judgment by consent.
2. One cannot complain on appeal of a judgment entered by his consent.

Appeal from District Court, Silver Bow County; John Lindsay, Judge.

ACTION by Sena E. Corby against W. H. Abbott. From a final judgment in plaintiff's favor, defendant appeals. Affirmed.

Mr. E. B. Howell, for Appellant.

Messrs. McHatton & Cotter, for Respondent.

MR. COMMISSIONER CLAYBERG prepared the opinion for the court.

Action for partnership accounting. Appeal by defendant from a final judgment rendered in favor of plaintiff.

Plaintiff alleged the existence of a partnership between herself and defendant, "for the purpose of carrying on and conducting a lease upon the water pumped from the Parrot mine

and other mines belonging to the Parrot Copper & Silver Mining Company, and precipitating the copper carried in solution in said water during the term of a certain verbal lease." Plaintiff further alleged that she was the owner of a one-third interest in said partnership and lease.

Defendant denied the partnership, and the interest of plaintiff as alleged, but admitted that plaintiff was entitled to a one-sixth interest in the lease, for the proceeds of which he had accounted to the plaintiff.

At the close of plaintiff's testimony a motion for nonsuit was made by defendant and denied. The judgment recites: "Witnesses on the part of the plaintiff and defendant were sworn and examined, and, after hearing the evidence and arguments of counsel," etc., the jury returned certain special findings. Defendant also moved the court to reject these findings. This motion was denied. The judgment sets forth the following recital: "Thereafter, by a stipulation and agreement of the parties, in writing, filed in this cause, it was stipulated by and between the said parties that there was due and owing to the plaintiff from the defendant, upon the basis of a one-third interest to plaintiff, and under the terms and provisions of this decree, the sum of \$609.38 at the date of the commencement of this action, and that the plaintiff is entitled to an undivided one-third of all the property and proceeds of the said partnership, and that judgment may be entered herein in accordance with said stipulation and agreement."

The ordering part of the judgment then follows. No objection is urged by appellant that the judgment does not conform to the stipulation. In fact, the attorneys for neither of the parties make any reference to this stipulation or recital.

The judgment having been entered upon the stipulation of the parties, it is in fact a judgment by consent. It is a familiar principle of law, which needs no citation of authority to sustain it, that no one can complain of a judgment entered by his consent. Appellant, therefore, cannot maintain this appeal.

We are of the opinion that the judgment should be affirmed.

PER CURIAM.—For the reasons stated in the foregoing opinion the judgment appealed from is affirmed.

Rehearing denied October 9, 1903.

ALLEN, RESPONDENT, v. REELY, APPELLANT.

(No. 1,641.)

(Submitted July 15, 1903. Decided July 20, 1903.)

Appeal—Rules of Supreme Court—Defective Brief—Affirmance.

Failure of appellant's brief to comply with the provisions of Subdivision "a" of Subsection 3 of Rule X of the Rules of the Supreme Court is fatal to the appeal.

Appeal from District Court, Ravalli County; F. H. Woody, Judge.

ACTION by Calvin L. Allen against J. W. Reely. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

Mr. George T. Baggs, and Mr. John M. Evans, for Appellant.

Mr. C. B. Calkins, for Respondent.

MR. COMMISSIONER POORMAN prepared the opinion for the court.

Appellant's brief fails to comply with the provisions of Subdivision "a," Subsection 3, of Rule X, of the Rules of this Court. Such failure has many times been held by this court to be fatal to an appeal. (*Larkin et al. v. Butte & B. Consol.*

Min. Co. et al., 28 Mont. 41, 72 Pac. 304; *Frederick et al. v. McMahon*, 28 Mont. 263, 72 Pac. 621; *Casey v. Thieviege*, 27 Mont. 516, 71 Pac. 755, and cases cited.)

No application has been made to correct the brief, and, under the decisions in the cases above cited, none of the questions sought to be raised can be considered.

We therefore recommend that the judgment and order be affirmed.

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

FOSTER ET AL., RESPONDENTS, v. BENDER ET AL., DEFENDANTS; BENDER, APPELLANT.

(No. 1,637.)

(Submitted July 15, 1903. Decided July 20, 1903.)

Appeal—Decree Canceling Tax Deed—Correction.

Judgment in favor of plaintiff canceling a tax deed, but failing to require payment to defendant of the amount admitted by plaintiff in his complaint to be due defendant, and so found by the district court, will on appeal be remanded to the court, with directions to amend its decree conformably to the conclusions found by it.

Appeal from District Court, Silver Bow County; John Lindsay, Judge.

ACTION by Lee W. Foster and another against Louis V. Bender and others. Decree for plaintiffs. Defendant Bender appeals. Remanded with directions to amend decree.

Mr. John O. Bender, for Appellant.

Messrs. McHatton & Cotter, for Respondents.

MR. COMMISSIONER CALLAWAY prepared the opinion for the court.

This action was brought for the purpose of canceling a tax deed affecting certain real property in the city of Butte, which was sold April 1, 1895, by the treasurer of Silver Bow county to Fergus F. Kelly for taxes attempted to be levied thereon in the year 1894.

In their complaint plaintiffs offered to pay the defendant the amount of all taxes, penalty, and costs assessed and accruing against the property for the year 1894, with interest thereon.

In its conclusions of law made upon a trial of the cause, the court found the plaintiffs entitled to have the tax deed canceled, and the defendant entitled "to the amount of taxes due upon the property for the year 1894, together with the interest thereon allowed by law upon delinquent taxes from the time of the sale of the premises to Fergus F. Kelly, assignor of the plaintiff." The word "plaintiff" should read "defendant;" it was conceded by all that Kelly was the assignor of the defendant, and the court so states in its findings of fact. Upon its findings of fact and conclusions of law, the court entered a decree in favor of plaintiffs, canceling the deed, but failed to provide in the decree that the plaintiffs should refund to defendant the taxes, penalty, costs and interest above mentioned.

The defendant complains that the decree is not responsive to the pleadings, and does not conform to the conclusions of law, because it cancels the tax deed without requiring payment to the defendant of the amount admitted by plaintiffs to be due, and so found by the court. The decree must be corrected in this respect.

We advise that the cause be remanded to the district court, with directions to amend its decree conformably to the conclusions heretofore found by it, and that, when so modified, the judgment be affirmed.

PER CURIAM.—For the reasons given in the foregoing opinion, the cause is remanded, with directions to amend the decree as above suggested, and, when so modified, the judgment will be affirmed.

STATE EX REL. PARROT SILVER & COPPER COMPANY, RELATOR, v. DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT ET AL., RESPONDENTS.

(No. 1,963.)

(Submitted June 26, 1903. Decided July 24, 1903.)

Mines and Mining—Action to Determine Extralateral Rights—Inspection and Survey—Order—Expenses—Constitutional Law—Due Process of Law—Taking Property Without Compensation.

1. When the possession of the surface of a mining claim and the apex of the vein found therein is shown, with the other facts establishing the right to pursue the vein on its dip, the presumption in favor of the owner of neighboring surface—arising from the doctrine "*cujus est solum, ejus est ad inferos*"—is overturned and disappears.
2. Under Code of Civil Procedure, Section 1314, the filing of a petition is not required; a motion sufficient to move the discretion of the court is all that is required.
3. Where it is made to appear from the allegations of the petition, either alone or by reference to the complaint, that there is good cause to believe that an examination of the property will aid the parties in the presentation of their case, and such allegations are supported by substantial evidence, it is sufficient to warrant the making of a proper order under Section 1314, Code of Civil Procedure.
4. If a stranger, under claim of title, encroaches upon the exterior portions of a lode by means of openings of which he has the exclusive control, Section 1314, Code of Civil Procedure, grants the owner of such exterior portions entry through, and a proper inspection and survey of, such underground workings of his adversary as are necessary to the ascertainment of the facts necessary to enable the owner to protect his rights.

28 528
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5. Where the issues do not render necessary an examination of all of defendant's workings, an order under Section 1314, Code of Civil Procedure, authorizing the plaintiffs to survey all the underground workings in the entire group of defendant's claims, is erroneous.
6. Where, in an action to determine the extralateral rights of the owner of lode mining property, it appeared that most of the workings in one of defendant's claims could be readily reached through plaintiffs' shaft, it was error for the court, in granting an order of inspection and survey under Section 1314, Code of Civil Procedure, to allow the plaintiffs access to defendant's workings exclusively through defendant's shafts, and by means of the latter's appliances.
7. Under Section 1314, Code of Civil Procedure, it was error to allow an inspection of defendant's workings, requiring defendant to use its appliances to lower and raise plaintiffs' agents in making such inspection, without providing for the payment by plaintiffs of the expenses incident thereto upon the presentation of a claim therefor by the defendant.
8. Where the evidence indicates conditions to justify a well-grounded belief that the adverse party is trespassing upon applicant's rights, the order, under Section 1314, Code of Civil Procedure, should be made.
9. Section 1314, Code of Civil Procedure, is not in contravention of Section 1, XIV Amendment, U. S. Constitution, as depriving the owner of property without due process of law.
10. Section 1314, Code of Civil Procedure, is not in contravention of Section 14, Article III, Constitution of Montana, prohibiting the taking or damaging of private property without just compensation first made to the owner thereof.

ORIGINAL application by the state of Montana, on the relation of the Parrot Silver & Copper Company, a corporation, against the district court of the Second judicial district of the state of Montana, and Hon. William Clancy, a judge thereof, for an order—under the supreme court's power of supervisory control—to vacate an order of the district court granting an examination, inspection and survey of relator's mines. Order modified.

STATEMENT OF THE CASE.

On May 18, 1903, an action was brought in the district court of Silver Bow county by the Nipper Consolidated Copper Company, the Cora-Rock Island Mining Company, and Chester A. Glass, against the Parrot Silver & Copper Mining Company, the purpose of which is to determine the extent of the extralateral rights of the plaintiffs upon certain veins alleged to have their tops or apices in the Nipper lode claim, and to quiet the title of the plaintiffs to said lode. The complaint alleges, in substance, that the plaintiffs are the owners of an undivided

31-36 of the Nipper lode claim (patented); that certain veins, containing valuable deposits of gold, silver and copper, have their tops or apices within the surface boundaries thereof; that the plaintiffs are the owners, in possession, and entitled to the possession of said veins, not only within the surface boundaries of the Nipper lode claim, but also to the exterior portions thereof, though upon their descent into the earth they so far depart from the perpendicular as to pass beyond the side lines of said Nipper lode claim; that these veins pass on their strike through the claim nearly parallel with the side lines; that the end lines of the claim are parallel; that the veins upon their descent into the earth pass into and beneath the surface of other claims toward the south of the Nipper claim belonging to or in possession of the defendant, among others, the Kanuck lode, lot 219; Dives lode, lot 188; Rialto lode, lot 190; Adventure lode, lot 125; lot 86b; Virginus lode, lot 72; Parrot lode, lot 134; Parrot lode, lot 45A; and Bellona lode, lot 122; that plaintiffs are informed and believe that the defendant asserts some claim or interest in the ore bodies lying in the exterior portion of said Nipper veins, between the planes of the end lines thereof extended in their own direction; that by means of underground workings beneath the other claims in possession of the defendant, and particularly beneath the surface of the Kanuck, Adventure, Parrot, lot 45A, Parrot, lot 134, and Bellona claims, the defendant has heretofore, without the consent of the plaintiffs, entered upon the Nipper veins, and removed therefrom, carried away and converted to its own use ores and minerals of great value, in amount unknown to the plaintiffs; that the defendant threatens to continue to enter upon portions of said veins beneath the various claims mentioned and remove valuable ores therefrom, thereby destroying plaintiffs' estate therein; and that the plaintiffs' right to the exterior portions of said veins cannot be adequately protected by suits at law. The prayer is that an injunction issue to restrain trespasses by the defendant pending the litigation; that the defendant be required to set forth the nature of its adverse claims; that a decree be en-

tered declaring said adverse claims to be without foundation; that the defendant be perpetually enjoined upon final decree from asserting any claim or interest in the Nipper veins; and that the plaintiffs have general relief. On May 25, 1903, the plaintiffs filed in this cause their verified petition asking the court to grant them an order for a survey, examination and inspection of the claims enumerated in the complaint, together with other claims not mentioned therein. The said petition, omitting the formal parts, is as follows:

"Come now the plaintiffs in the above-entitled action and respectfully show: (1) That heretofore, and on or about the 18th day of May, 1903, they commenced this action against the above-named defendant by filing their complaint herein, which complaint is hereby referred to and made a part hereof, and caused summons to be issued herein, directed to said defendant, which summons, together with a copy of said complaint, they are informed and believe was heretofore served upon said defendant. (2) That plaintiffs are informed and believe, and upon such information and belief allege, that the defendant is in possession of all of the following described ground, claiming the same as quartz lode mining claims, to-wit, Kanuck lode, lot 219; Dives lode, lot 188; Rialto lode, lot 190; Adventure lode, lot 125; Original lode, lot 161; lots 86A and 86B; Original lode, lot No. 6; Virginius lode, lot 72; Midnight lode; Grey Eagle lode; Parrot lode, lot 134; Parrot lode, lots 45A and 45B; and Bellona lode, lots 122 and 61; and that underneath the surface of all of the said premises, lying within the planes described in plaintiffs' complaint, drawn, respectively, through the east and west end lines of the Nipper lode claim, and extended in their own direction to the south across said premises, the defendant has various shafts and openings, which are connected with underground workings extending beneath the surface of said premises, and which shafts and openings are in the exclusive possession and control of the defendant, and that defendant, by means thereof, controls the access to said underground workings, and claims the

possession of all of the underground workings aforesaid, and that, by reason thereof, the plaintiffs have no access thereto, and that entry thereto will have to be made by means of the shafts and openings aforesaid in the possession of the defendant. (3) That it is necessary, in order for the plaintiffs to ascertain and protect their rights in the veins and ore bodies described in the complaint and underlying the surface of the aforementioned premises, to have access through and to all of said openings and underground workings, and to have a survey, examination and inspection thereof; and that such access, survey, examination and inspection is necessary for the plaintiffs to have in order to prepare witnesses, and to present the facts in controversy in this action upon the trial thereof, and upon any hearing that may be had in the case. That, in order to do so, it will be necessary for the plaintiffs, by their agents and representatives (not less than six in number), to be permitted to inspect, examine and survey all of the said claims, and all workings and openings therein, and all workings and openings made therefrom, within the territory lying within the planes aforesaid, for a period of at least twenty (20) days; and that, for the purpose of such inspection, examination and survey, the agents and representatives of the plaintiffs be permitted ingress and egress to and from all of the said claims and workings, through the shafts and openings, and by means of the machinery and appliances, of the defendant. That it is also necessary, in order to ascertain and protect the rights of the plaintiffs in the Nipper lode claim and in the veins and ore bodies described in the complaint, and to enable them to present the facts in controversy in said action upon any trial or hearing that may be had therein, that they be permitted, by their authorized and appointed agents, to, at all reasonable times pending the above mentioned suit, inspect and examine all of the underground workings in the premises lying between said planes and above mentioned; and that, for the purpose aforesaid, it is necessary that the petitioners have such inspection, examination and survey as soon as possible. * * **

Upon the filing of this petition the court issued an order to show cause, and fixed the hearing for June 6th. On the day set for the hearing the defendant appeared and made various objections to the granting of the order, and moved the court to dismiss the petition. These grounds are stated, briefly, as follows: That the complaint does not state a cause of action; that it is uncertain, ambiguous and unintelligible; that the petition does not show good cause for making an order of survey and inspection; and that the order, if granted, would constitute a taking of property of the defendant without due process of law, and in violation of the Constitution of the State of Montana and the Constitution of the United States. These objections having been overruled, the defendant filed its answer, putting in issue the material allegations of the petition, and alleging title in itself to certain ore bodies beneath the surface of the claims described. It also admitted ownership of the claims mentioned in the petition, except the Dives. The answer further denied any trespass upon any portion of the Nipper vein, and disclaimed any interest whatever therein. Evidence was introduced, and thereupon the court, after consideration, granted an order permitting the agents of the plaintiffs to enter upon all the lodes mentioned in the petition, except the Dives lode, which does not belong to either party to the controversy, and for the space of thirty days, beginning with the 12th day of June, to examine, inspect and take surveys of all of the underground workings therein. The order further directed that during the said thirty days the defendant should accord to the agents of the plaintiffs the use of all its machinery and other appliances necessary for the purpose of ingress into, and egress from, the premises and workings, and to hoist and lower the said agents at all reasonable hours. It also directed that after the close of thirty days two agents of the plaintiffs should have access to said workings at reasonable times at least once a week, for the purpose of inspection and examination, until the final hearing of the cause.

An application was thereupon made to this court for an order,

under its supervisory power, to vacate the order of the district court. The grounds urged in support of the application are the following: (1) The order to show cause was improvidently granted, because the complaint does not state a cause of action, and because it is so uncertain in the particulars alleged that the defendant should not be required to answer the same, or to show cause why an order of inspection should not be made.

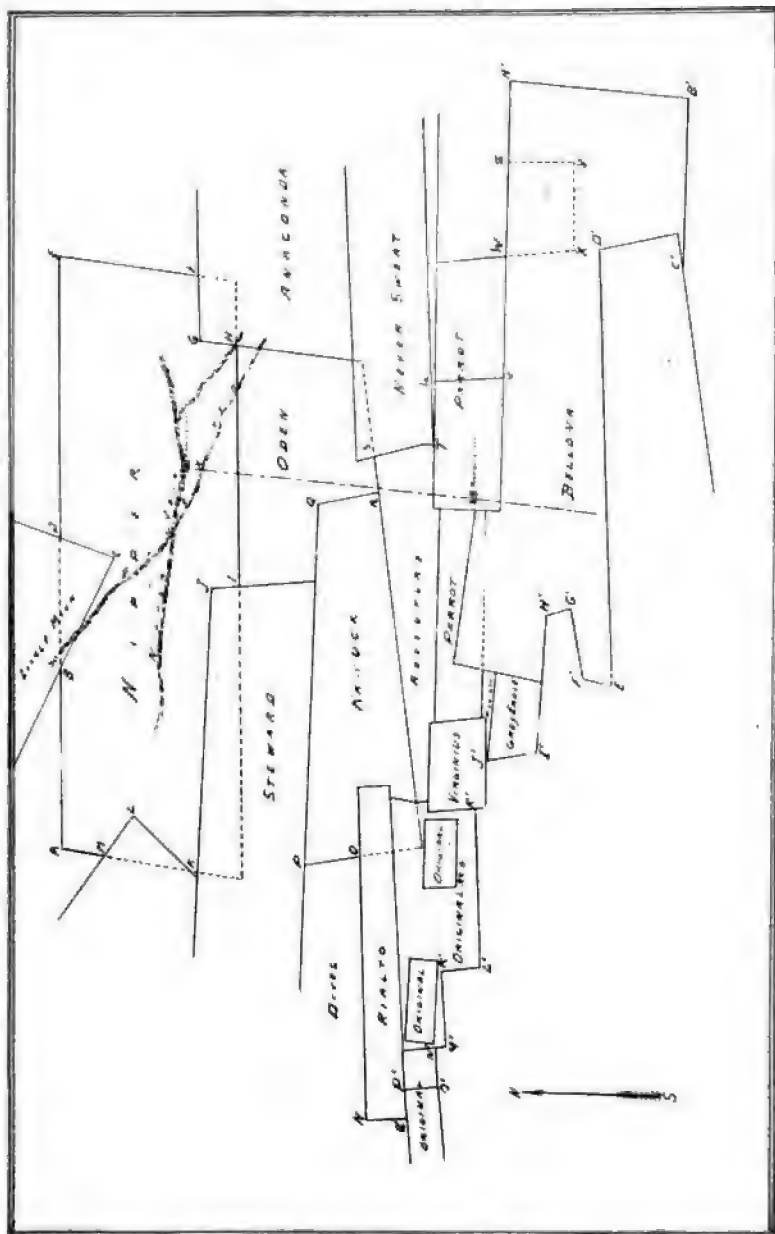
(2) No order of survey should be granted, because the evidence is wholly insufficient to show the existence, within the boundaries of any of the claims in possession of the defendant, except the Adventure claim, of any vein having its apex in the Nipper claim, and as to the Adventure no necessity for an order is shown.

(3) The order is not justified in so far as it permits a survey outside of the Adventure claim, because the proof fails to show the existence of any vein having its apex within the Nipper claim and extending into any of the said claims, and fails to show any workings made by the defendant within the lines of said claims. This is particularly true of the Kanuck, Dives, Rialto, Adventure, Original, Virginus, Midnight, Grey Eagle, Parrot and Bellona.

(4) The order is unauthorized and in excess of jurisdiction, in that it does not limit the survey to workings upon the veins asserted to constitute a part of the Nipper lode claim, but permits a survey and examination of all the workings of the Parrot Company upon any or all of the veins therein, whether they are the parts of the Nipper vein or not.

(5) The order is erroneous and not valid, in that it requires the defendant to raise and lower, by means of its own appliances, through its own shafts, the agents of the plaintiffs, without any provision whatever for ascertainment and payment to the defendant, in advance, of compensation for such services.

The relative positions of the claims in controversy, and the strike and dip of the vein, will be understood by reference to the subjoined diagram:



The Nipper claim is represented by the figure marked "Nipper." The strike of the vein, according to plaintiffs' evidence, is correctly indicated by the words "Nipper Vein," a branch of it extending from a point near the shaft toward the southeast in the direction of the Anaconda claim. The irregular figure indicated by the letters P, Q, R, etc., includes the group of claims belonging to the defendant.

The evidence introduced at the hearing shows that the Nipper vein has been developed by means of what plaintiffs call their "apex drift," about 60 feet beneath the surface, and extending from the shaft to a point near the west boundary of the claim, and also eastward on both branches. An inclined shaft descends from the point marked "Nipper Shaft," following the dip of the vein exposed in the shaft in the direction of the dotted line, to workings in the Adventure, 1,350 feet below the surface. Openings have been made by the plaintiffs in connection with this shaft at the 150, 250, 500, 600, 800, 1,000 and 1,150 foot levels. The defendant has extensive workings in the Kanuck, Rialto, Adventure, Original, lots 6 and 61, A and B, Virginius, Midnight, Grey Eagle, Parrot, lots 134, 45A and 45B, and the Bellona. Most of the workings in the Adventure can be reached by means of plaintiffs' shaft descending from the Nipper. The workings in the other claims, it seems, though the proof showing the exact conditions is not clear, can be reached only through the Parrot shaft, or other openings in possession of the defendant. The workings in the Parrot claim, at and below the 1,000 foot level, extend into the Kanuck and Adventure. At the 1,000 foot level they are upon the Nipper vein. In the Rialto the lowest workings are at the 160 foot level. The depth of the workings in the Adventure and Original claims is not shown. Those in the Parrot (including all the lots) and the Bellona extend down to the 1,500 foot level, but a part of them at the latter level has been made by the Anaconda Company through the Never Sweat, presumably in pursuit of the vein found in that claim. The workings in the Midnight and Grey Eagle are, or seem to be, a part of the general

plan of workings in the Parrot and Bellona claims. The veins exposed in them all strike east and west, and in the Parrot dip at an angle of about 65 degrees to the south. The Nipper vein, near the western boundary of that claim, has a dip of 85 degrees to the south. This angle decreases toward the east until it becomes about 30 degrees at the shaft.

The complaint in the case stands upon demurrer, but, so far as can be judged from the statements contained in the answer to the petition (the defendant did not introduce evidence), the claim of the defendant is that the plaintiffs have no title to any ore bodies within the lines of its claims to the south, for the reason that the Nipper vein crosses both side lines of that claim, as is indicated by what is called the "Blue X Vein" on the diagram, and hence that plaintiffs have no extralateral rights toward the south. From this point of view the side lines of the Nipper are, for the purpose of determining the extralateral rights of the plaintiffs, its end lines. The controversy upon the merits is therefore the same as that involved in the case of *Parrot Silver & Copper Co. v. Heinze*, 25 Mont. 139, 64 Pac. 326, wherein we considered, upon application for injunction, conflicting rights between the Little Mina and the Nipper upon the same veins. There is nothing in the evidence to indicate what, if any, workings have been done beneath the surface of the Steward, Oden, Anaconda and Never Sweat claims, which lie between the Nipper and the defendant's claims.

Mr. W. W. Dixon, Mr. A. J. Shores, Mr. C. F. Kelley, and Mr. D. Gay Stivers, for Relator.

Messrs. McHatton & Cotter, for Respondents.

MR. CHIEF JUSTICE BRANTLY, after stating the case, delivered the opinion of the court.

1. This application was made under the provisions of Section 1314 of the Code of Civil Procedure. It is urged in this court, as it was in the court below, that the complaint does not

state a cause of action, and is so indefinite in the particulars alleged that the defendant should not be required to answer the same, or show cause why the order applied for should not be made.

The theory of the action is that, as the end lines of the Nipper are parallel, and the vein in controversy whose apex is found therein passes through the end lines, the plaintiffs are entitled to follow the vein on its dip into the lands of the defendant. It must be conceded that if this theory is supported by the facts, and if it further appears that the defendant asserts title to any of the ore bodies found upon the exterior portions of the Nipper vein beneath the surface of its claims, the action may be maintained, and the plaintiffs should be granted a decree quieting their title to such ore bodies; for the assertion by the defendant, under such circumstances, of an adverse claim to exterior portions of the vein, is sufficient to authorize the court to entertain the action, and to enter such decree therein as the facts justify. (*Montana Ore Pur. Co. v. Boston & Montana C. C. & S. Mining Co.*, 27 Mont. 288, 70 Pac. 1114.) Under the holding announced in that case, the possession of the surface of a claim and of the apex of the vein found therein, so situated in its dip and strike as to give extralateral rights, draws to it also the possession of the exterior portions of the vein, in the same way and to the same extent as the possession of the surface implies possession of everything perpendicularly beneath it. This presumption is subject to the *prima facie* presumption, in favor of the adverse claimant, arising from the principle, "*Cujus est solum, ejus est ad inferos*," but when the possession of the surface and apex is shown, with the other facts establishing the right to pursue the vein on its dip, the presumption arising from the *cujus solum* doctrine is overturned and disappears. This must be so; otherwise the owner of a vein which dips beneath his neighbor's surface, though he has been granted title to it under his patent, must demonstrate his title to every foot of it as it descends into the earth after it passes beyond his side lines. Such a condition would be intolerable. But this is somewhat of a digression.

We cannot upon this proceeding take up the questions presented upon the demurrer as original questions and decide them. The jurisdiction of this court to try and determine this class of questions is appellate, and not original. It is confined to a review on appeal from the action of the district court thereon in the regular way. That court is one of original general jurisdiction, and questions arising in the ordinary course must be determined by it before the revisory power of this court may be invoked. It is sufficient for the purpose of an application for an order of inspection and survey, so far as the pleadings filed in the district court are concerned, that it appear that an action is pending involving title to real estate. We may not look further than to ascertain this fact. If it is made to appear from the allegations of the petition, by the facts stated therein, either standing alone or aided by appropriate reference to the allegations contained in the complaint, that there is good cause to believe that an examination of the property will aid the parties to present their rights in the proper way, and the court to intelligently adjust them, and such allegations are supported by substantial evidence, it is sufficient to warrant the making of the order under proper restrictions; for, if the party making the application should be held to strictness of allegation and proof, he would be required to produce to the court in the first instance the facts which it is the purpose of the application to obtain. The remarks on this subject by this court in *State ex rel. Geyman v. District Court*, 26 Mont. 483, 68 Pac. 861. are pertinent, and, we think, are conclusive on the point urged. The district court has jurisdiction of the action. The order was proper, provided the showing made was "good cause," within the meaning of that term as used in the statute. Strictly speaking, the statute does not require the filing of any petition. A motion sufficient to move the discretion of the court is all that is required.

But counsel say that, upon the showing made by the complaint and the petition, the property of which the inspection is sought belongs to the defendant, and not to the plaintiff, while

the statute authorizes inspection and survey of the particular property in controversy, to-wit, the Nipper claim. The statute provides: "The court in which an action is pending for the recovery of real property or mining claims, or for damages for an injury, or to quiet title or to determine adverse claims thereto, or a judge thereof, may, on motion, upon notice by either party, for good cause shown, grant an order allowing to such party the right to enter into or upon the property or mining claim and make survey or measurement thereof, or of any tunnels, shafts or drifts therein, for the purpose of the action, even though entry for such purpose has to be made through other lands or mining claims belonging to parties to the action."

The exterior portions of a lode, situated as it is alleged the Nipper lode is, are substantial parts of the property conveyed by the patent, and if a stranger, under claim of title, encroaches upon such portions by means of openings of which he has exclusive control, the statute furnishes the owner the means of ascertaining the facts necessary to enable him to protect his rights, and authorizes entry for that purpose through the property of his adversary. It authorizes also a survey of the tunnels, shafts and drifts therein for the purpose of the action. If the survey and inspection must be limited with absolute certainty to the openings made upon the lode itself, and to the ascertainment of the physical and geological facts to be found there, the purpose of the statute would be defeated. Its evident intent and purpose is to furnish the court and the parties with all the surrounding facts, so that the action may be conducted to a proper conclusion. The extent of the inspection and survey must be limited only by the necessities of the action as they are made to appear. (*State ex rel. Anaconda Copper Mining Co. v. Dist. Court*, 25 Mont. 504, 65 Pac. 1020.) It is as important to know how to frame the issues in the causes as it is to produce the evidence in support of them. (*State ex rel. Heinze v. Dist. Court*, 26 Mont. 416, 68 Pac. 794.)

The petition, though somewhat general in its statements, is sufficient in substance to support the order, aided, as it is, by

reference to the allegations of the complaint. It does not matter that it and the complaint speak of veins, while the evidence tends to show the existence of a single vein.

2. The facts, however, as they appear in the record, do not justify the order to the extent to which it goes. It authorizes the plaintiffs to survey all the underground workings in the entire group of defendant's claims, between perpendicular planes passing down through the west end lines of the Nipper and Anaconda claims extended in their own direction to the south. This includes all the openings of all the claims from the surface downward, whether made by the defendant and in its possession or not. When we look at the issues, so far as they are developed in the case, no reason is apparent why the inspection should be had in any of the openings not in reasonable proximity to the Nipper vein on its dip. The plaintiffs assert that the vein dips beneath the defendant's claim at an angle varying at different points along the strike from 85 degrees at the extreme west to 30 degrees near the shaft. It is exposed only in the Adventure, in the Parrot, and perhaps in the Bel-lona, after it leaves the territory of the Nipper, at and below the 1,000 foot level. The defendant insists that the vein crosses the side lines of the Nipper, and hence that, though it has done some work upon it, the plaintiffs have no right to complain, because they have no right to these portions of the vein. It does not appear that any work has been done in the Rialto claim below the 160 foot level, or that any possible benefit could result from an inspection of the workings of any of the claims above the 1,000 foot level, where the point of conflict is. A different situation would be presented if the defendant claimed the vein at and below the 1,000 foot level by virtue of an older location, and of the union of the Nipper vein with a vein having its apex in defendant's ground. Such an issue would render necessary an examination of all of the defendant's workings from the surface, in order to determine the rights of the respective parties.

A somewhat similar issue was presented in the case of *State ex rel. Heinze v. Dist. Court*, 26 Mont. 416, 68 Pac. 794, and

an order of examination and survey granted to the defendant in that case, and extended to the whole of plaintiff's claim, sustained, on the theory that the defendant might be able to learn the facts upon which the plaintiff's claim was predicated, and thus be enabled to frame the issues accordingly. The only necessity for the order in this case appears to be to enable the plaintiffs to sustain the issues tendered to the defendant.

Furthermore, the order in question seems to require the defendant to allow the plaintiffs access to the workings exclusively through shafts, and by means of appliances, in possession of the defendant. This would have been entirely proper, as we shall presently see, if the necessities of the case had demanded such an order. The evidence tends to show, however, that most of the workings in the Adventure can be readily reached through the Nipper shaft. As to these openings, the only burden which the defendant may be called upon to assume is to permit free access to them. The duty of lowering and raising the plaintiffs' agents should have been limited particularly to those workings to which access is not practicable except through the defendant's shafts and by use of its appliances. Again, the order makes no provision for the payment by the plaintiffs of the expenses incident to the lowering and raising of their agents by means of the defendant's appliances. Section 1317 of the statute requires the applicant to pay all the expenses of examination, survey and inspection, and clearly such expenses as are attendant upon access to the property would fall within the purview of this provision. (*State ex rel. Anaconda Copper Mining Co. v. Dist. Court*, 26 Mont. 396, 68 Pac. 570, 69 Pac. 103.) The order should have required payment of such expenses upon the presentation of a claim therefor by the defendant.

3. The Dives claim was properly excluded from the order, because it was shown not to belong to the defendant. Defendant, therefore, has no ground to complain with reference to it. The order should also have excluded the Rialto claim, for the reason that there does not appear to be any necessity for any

inspection of it. None of the openings made in it are below the 160 foot level, and hence no light could be shed upon the issues involved by an inspection of them. As to claims mentioned in the order other than the Adventure, Kanuck, Midnight, Grey Eagle, Bellona and Parrot, including all of the three lots, the evidence is confined to these facts, to-wit, that they lie south of the Nipper claim, that the Nipper vein dips in their direction at an angle varying between 85 degrees and 30 degrees, that extensive workings have been done in them, and that they lie generally along the line of the strike of the vein as shown by the direction followed by the apex in the Nipper ground. This evidence is not very convincing, but we are not willing to say that it is entirely insufficient to warrant the inclusion of these claims in the order, especially so in view of the fact that the workings therein are exclusively in the possession of the defendant, and it is impossible for the plaintiffs to obtain any knowledge of the conditions existing therein without an inspection of them. Defendant offered no evidence on the subject, and, even if it had, the plaintiffs would not be bound by it; and, where the evidence indicates conditions to justify a well-grounded belief that the adverse party is trespassing upon the applicant's rights, the order should be made. (*State ex rel. Geyman v. Dist. Court*, 26 Mont. 483, 68 Pac. 861.)

It should be steadily borne in mind, both by the courts and the parties, in controversies of this kind, that the object to be attained is a just determination of disputed rights, and that the respective parties must, for the time being, submit to whatever temporary inconvenience may be cast upon them in order to accomplish this purpose.

4. What has already been said as to the extent of the order disposes of the fourth contention made by the relator. The examination and survey should have been confined to the workings upon the Nipper vein, and those in such proximity thereto that the result would be an aid to the plaintiffs, and not an unnecessary infringement upon the rights of the defendant.

5. Earnest contention is made that the order is in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States, prohibiting the deprivation of property without due process of law, as well as of the provisions of the state Constitution prohibiting the taking or damaging of private property without just compensation first made to the owner thereof. (Constitution, Article III, Section 14.)

In *St. Louis Mining & Milling Co. v. Montana Company*, 9 Mont. 288, 23 Pac. 510, similar objections made to an order granted under Section 1317 were considered by this court and overruled. In the same case, on error to the Supreme Court of the United States, that court discussed the various constitutional objections to the order, and, after an extensive examination of the authorities, overruled them all. In concluding its discussion of the question whether or not the making of such orders, and the temporary invasion thereunder of the property of a citizen, is taking property without due process of law, that court said: "In conclusion, it may be observed that courts of equity have, in the exercise of their inherent powers, been in the habit of ordering inspections of property, as of requiring the production of books and papers; that this power on the part of such courts has never been denied, and if it exists, *a fortiori*, the state has power to provide a statutory proceeding to accomplish the same result; that the proceeding provided by this statute requires notice to the defendant, a hearing, and an adjudication before the court or judge; that it permits no removal or appropriation of any property, nor any permanent dispossession of its use, but is limited to such temporary and partial occupation as is necessary for a mere inspection; that there is a necessity for such proceeding in order that justice may be exactly administered; that this statute provides all reasonable protection to the party against whom the inspection is ordered; that the failure to require a bond, or to provide an appeal, or to have the question of title settled before a jury, is not the omission of matters essential to due process of law. It follows, therefore, that there is no conflict between this statute and the

Fourteenth Amendment of the Constitution of the United States." (*Montana Company v. St. Louis Mining & Milling Co.*, 152 U. S. 160, 14 Sup. Ct. 506, 38 L. Ed. 398.) In another place in the opinion, the court, in speaking of the matter of temporary invasion of the property of a citizen for the purpose of aiding in the administration of justice, said: "To 'establish justice' is one of the objects of all social organizations, as well as one of the declared purposes of the Federal Constitution; and if, to determine the exact measure of the rights of parties, it is necessary that a temporary invasion of the possession of either for purposes of inspection be had, surely the lesser evil of a temporary invasion of one's possession should yield to the higher good of establishing justice; and any measures or proceedings which, having the sanction of law, provide for such temporary invasion with the least injury and inconvenience, should not be obnoxious to the charge of not being due process of law."

Nor does such temporary invasion of the property of a party to a controversy fall within the prohibition of the Constitution of Montana forbidding the taking or damaging of private property without compensation first made. Such temporary invasion is not the taking or damaging of property within the purview of the constitutional provision. Every citizen has the right to the exclusive enjoyment of his property, without interruption or invasion; yet this general rule of right must, under the circumstances of the case, yield to the higher right of public necessity, that equal justice may be administered upon conflicting rights of different citizens. Every citizen holds his property subject to this burden, and when the necessity arises his private right must give way to this higher law.

In *Thornburgh v. Savage Mining Co.*, District Judge Baldwin, speaking for the United States Circuit Court for the District of Nevada, in discussing this phase of the law, says: "Ought a court of equity, in a mining case, when it has been convinced of the importance thereof for the purposes of the trial, to compel an inspection and survey of the works of the

parties, and admittance thereto by means of the appliances in use at the mine? All the analogies of equity jurisprudence favor the affirmative of this proposition. The very great powers with which a court of chancery is clothed were given it to enable it to carry out the administration of nicer and more perfect justice than is attainable in a court of law. That a court of equity, having jurisdiction of the subject-matter of the action, has the power to enforce an order of this kind, will not be denied. And the propriety of exercising that power would seem to be clear, indeed, in a case where, without it, the trial would be a silly farce. Take, as an illustration, the case at bar. It is notorious that the facts by which this controversy must be determined cannot be discovered except by an inspection of works in the possession of the defendant, accessible only by means of a deep shaft and machinery operated by it. It would be a denial of justice, and utterly subversive of the objects for which courts were created, for them to refuse to exert their power for the elucidation of the very truth—the issue between the parties. Can a court justly decide a cause without knowing the facts?" (7 Morr. Min. R., at page 680.) This language is quoted with approval by the Supreme Court of the United States in *Montana Company v. St. Louis M. & M. Co.*, *supra*. In that case the court proceeded, under the inherent power vested in courts of equity, to do whatever was necessary to a proper adjustment of the rights of the parties. If courts of equity have inherent power to make such orders, and for the purpose of making them effective require the party whose property is affected to furnish to his adversary the appliances necessary to gain access to the property, and without which such access is impossible, surely it is within the power of the legislature to provide by statute for the making of the order, and, either expressly or by implication, to authorize the court to make its order effective.

The order complained of is defective, in that it fails to provide the compensation contemplated by Section 1317 of the statute, but the provisions of the statute itself are not in contra-

vention of either the Constitution of the United States or of the state of Montana.

As the necessities of the case may develop from time to time the order may be extended, but for present purposes the district court is directed to modify its order as made in the following particulars: To exclude the Rialto claim altogether; to omit the requirement that the defendant furnish to the plaintiffs access to the openings in the Adventure by means of the defendant's appliances, except so far as it is shown to be necessary; to exclude from the order all the openings in any of the claims above the 1,000 foot level, and also those in the Parrot and Bellona claims in the possession of the Anaconda Company; and to add a requirement that the plaintiffs pay to the defendant the reasonable expenses incident to the use of the defendant's appliances, so far as such use is necessary to obtain free access to workings that cannot be reached through plaintiffs' own shaft. If, in order to observe these directions, it be found necessary to hear other evidence, the court may hear it at such time as may be convenient.

Modified.

MR. JUSTICE HOLLOWAY: I concur in all that is said in the first four paragraphs of the opinion. As to the conclusions reached in paragraph 5, I dissent. I do not think that the precise point in controversy here was involved in *St. Louis M. & M. Co. v. Montana Co.*; 9 Mont. 288, 23 Pac. 510, on error, 152 U. S. 160, 14 Sup. Ct. 506, 38 L. Ed. 398. Upon each of those appeals the contention of respondent was that the mere invasion of private property of another for the purpose of making a survey and inspection does not constitute a taking within the meaning of the Constitution; that "taking," as therein used, means a permanent deprivation of the owner of his property. In that suit access to the workings of the defendant's property could be had through a tunnel, and therefore no question was involved as to the power of the court to compel the defendant to furnish the means of access. Admittedly, the defendant is the

owner of the properties through which the plaintiffs desire to enter and survey the ground in controversy. That being true, in my opinion the statute does not authorize the court to compel the defendant to make use of its coal, engine, hoist and men for the purpose of enabling the plaintiffs to pursue their examination, and, if it did, it would be unconstitutional, as depriving the defendant of its property without due process of law. I cannot understand why the defendant may not shut down work in the Parrot shaft and refuse to operate the same if it desires to do so. I do not agree with the doctrine announced in *Thornburgh v. Savage Mining Co.*, 7 Mor. 667.

FINLEN, APPELLANT, v. HEINZE ET AL., RESPONDENTS.

(Nos. 1,824, 1,839.)

(Submitted April 1, 1903. Decided July 24, 1903.)

Mines — Claims — Assignment — Validity — Specific Performance — Consideration — Adequacy — Burden of Proof — Conspiracy — Champerty — Evidence — Judgment — Modification — New Trial — Misconduct of Judge — Appeal — Assignments of Error — Sufficiency — Presumptions — Harmless Error — Review — Briefs — Costs.

1. Under Code of Civil Procedure, Section 1173, providing that, where the notice of motion for a new trial designates, as a ground, the insufficiency of the evidence to justify the verdict or other decision, the statement shall specify the particulars in which the evidence is alleged to have been insufficient, and, if no specifications are made, the statement is to be disregarded, a specification merely alleging that the evidence is insufficient to justify a certain finding set out is insufficient.
2. Code of Civil Procedure, Section 4417, provides that specific performance cannot be enforced against a party to a contract if he has not received an adequate consideration therefor. *Held* that, while a party seeking specific performance of a contract is required to set forth the consideration therefor, the burden of proof that such consideration is inadequate is on the party resisting specific performance.
3. Notwithstanding a statute may have been taken from another state, the supreme court will decline to follow the decisions of such state upon the

subject when they are in direct conflict with its own decisions and are opposed to what appears to it to be the better reasoning.

4. Where, at the time of the making of an agreement to assign certain mining leases, options, and bonds, it was admitted that the assignor had expended at least \$54,000 in developing the mine, without exposing any ore of commercial value, when the assignee agreed, in consideration of the assignment, to keep up the leases and bonds, continue the development, and, if the property appeared to the assignee to justify its purchase, to pay the assignor \$54,000 therefor, without further risk or liability to the assignor, and thereafter the assignee made discoveries of great value in the mine, a finding that the consideration for the contract was not so inadequate as to preclude a decree of specific performance was justified. since the point of time to which the question of adequacy relates is the time of the formation of the contract.
5. Where, at the time of the making of an agreement to assign certain mining leases, options, and bonds, the assignor had made explorations along the vein, and had concluded that an adjoining mine owner was trespassing on a vein having its apex within the boundaries of the mine leased and assigned, either the assignor or the assignee might have prosecuted such alleged trespass; and hence the fact that the assignment required that the assignor should prosecute such action for the benefit of the assignee, who agreed to pay the expenses of the litigation, did not render the contract void as a conspiracy within Penal Code, Section 320, making it a misdemeanor for persons to conspire falsely to maintain any suit, etc.
6. Where an assignor of an interest in a mining claim retained a contingent interest in the property, his agreement, which was a part of the assignment, to prosecute a suit in his own name against an alleged trespasser for the benefit of the assignee, at the latter's expense, was not champertous.
7. Where an action to recover an interest in a mining claim was tried on the issues raised by the counterclaim seeking specific performance of an alleged contract by plaintiff to convey his interest in such claim to defendant, and the answer thereto, a decree of specific performance would not be reversed on the ground that defendant's answer to plaintiff's complaint alleged that plaintiff had forfeited all his rights to the mine prior to the date of the agreement sought to be enforced.
8. Where, in an action tried to the court, the evidence admitted without objection was sufficient to sustain the court's findings, it will be presumed on appeal that evidence erroneously admitted was not considered by the court in arriving at its conclusion.
9. Where a question objected to and excluded had been previously answered, the refusal of the court to permit its repetition was not error.
10. Error in exclusion of pleadings in another action, offered in evidence, cannot be reviewed, where they are not included in the statement on the motion for a new trial.
11. Where, in an action to recover an interest in a mining claim, a court entered a decree granting specific performance of an alleged agreement to convey plaintiff's interest to one of the defendants, it had no jurisdiction to subsequently modify such decree by adding a paragraph retaining jurisdiction with reference to the granting of an injunction restraining the operation of the mine.
12. Where appellant filed a brief containing 283 pages, much of which was repetition, and consisted of long arguments, extended excerpts from reported cases, and irrelevant matter, the cost of printing such brief would not be allowed on reversal of the judgment.
13. Where an action was tried to the court, and a female employe of one of the successful defendants had communications with the judge, and wrote letters to him, to which he replied, soliciting further conversation with relation to the case while the same was being argued before him, and such letters

containing references to benefits to be derived by the judge in case of a decision favorable to the writer's employer, and the judge, in an affidavit submitted, failed to deny the authorship of the reply, such acts entitled plaintiff to a new trial.

14. Affidavits, not explained away, casting grave suspicion upon the integrity of a court's decision, is ground for a new trial, without reference to the merits of the case.

Appeal from District Court, Silver Bow County; E. W. Harney, Judge.

ACTION by Miles Finlen against F. Augustus Heinze and others. From a decree entered in accordance with the prayer of said Heinze's counterclaim, from an order overruling a motion for a new trial, and from an order modifying the decree, plaintiff appeals. Reversed.

STATEMENT OF THE CASE.

This action was originally commenced by the plaintiff, Finlen, against the defendants, Arthur P. Heinze, Montana Ore Purchasing Company, the Johnstown Mining Company and F. Augustus Heinze, to recover possession of the Minnie Healy lode mining claim. The complaint alleges that the plaintiff had certain leases and bonds from John Devlin, Mrs. Devlin and Mrs. Reilley upon an undivided three-fourths interest in the claim, and from Caroline V. Kelley upon an undivided one-twentieth interest therein; that under the terms of these leases and bonds he had the option to purchase such interests at any time prior to February 3, 1900, upon complying with the terms thereof, and paying the purchase price agreed upon; that he had kept all the terms of the leases and bonds by him to be kept or performed; "that on or about the — day of —, 1899, and before the commencement of this action, and while plaintiff was in actual possession of the whole of said Minnie Healy claim, and, by virtue of said lease and agreements above mentioned, entitled to the possession of said Minnie Healy claim, the said defendants above named forcibly, and without plaintiff's consent, and against his will, and without any right so to

do, entered into and upon the said Minnie Healy lode claim and the underground workings thereof, and ousted and ejected plaintiff therefrom, and ever since have, and do now, retain from plaintiff the possession of said claim, and every part thereof."

The complaint contains a second cause of action for damages for ores extracted, and prays for an injunction restraining the defendants from further operating the mine.

To this complaint the defendants Arthur P. Heinze and the Montana Ore Purchasing Company filed an answer, denying that they, or either of them, ever at any time entered into the possession of the Minnie Healy lode claim, or any portion thereof, or mined or extracted any ore therefrom, or converted the same to their own use. The defendant Johnstown Mining Company interposed an answer denying the material allegations of the complaint, and setting up its claim to an undivided one-eighth interest in the property acquired from the rightful owner, without any notice of the plaintiff's outstanding claims. The defendant F. Augustus Heinze filed an answer admitting the allegations of the complaint with reference to the original ownership of the Devlins, Reilley and Kelley, the execution of the leases and bonds, and their transfer by mesne conveyance to the plaintiff, and denying the other material allegations of the complaint. The answer sets up new matters by way of affirmative defenses, and also an equitable counterclaim ("cross-bill," so called), in which, after reciting the history of the execution of the leases and bonds, their transfer to the plaintiff, his possession and working the claim thereunder (in which operations it is alleged he expended a large amount of money without being able to make discovery of any ore of commercial value), it is alleged the plaintiff represented to defendant Heinze that the claim would not justify his further prosecuting work or expending money on it, and that he was anxious to dispose of his options on the property. It is further alleged that on November 21, 1898, the plaintiff entered into an agreement with the defendant Heinze whereby he made an optional assignment of all

of his interests in the leases and bonds to Heinze, upon consideration that Heinze would go into possession of the property, work the same, keep the leases and bonds alive, and, if the property appeared to him (Heinze) to be of sufficient value to justify its purchase under the leases and bonds, then he would pay to the plaintiff, Finlen, \$54,000. It is alleged that this assignment was made by a verbal agreement, but that plaintiff agreed to execute formal written assignments as soon as they could be prepared and presented to him; that he (Heinze) was put in possession of the property by the plaintiff, and, relying upon the agreement so made and the representations of the plaintiff, he fully kept and performed all the terms of the leases and bonds to be kept and performed by the lessee, and, with the full knowledge and consent of the plaintiff, expended large sums of money in exploring and developing the property; that he discovered and exposed large bodies of valuable ore, whereby the claim was greatly enhanced in value, and became worth much more than when he took possession of it; that he deemed himself justified in purchasing, and would purchase, the interests of the Devlins, Reilley and Kelley, and is ready and willing to pay to the plaintiff, Finlen, the agreed sum of \$54,000, but that the plaintiff now refuses to make such written assignments, and denies that the defendant has any interest in the leases and bonds, or any of them, and has assumed to purchase from Mrs. Kelley her one-twentieth interest in the property, and has taken a deed therefor. The prayer of the counterclaim is that Finlen be required to make such assignments; that he be declared to be a trustee for the benefit of the defendant Heinze of the one-twentieth interest acquired from Mrs. Kelley; and that he be required to make transfer of the same, upon defendant Heinze paying into court the sum of \$54,000, and the further sum which the plaintiff had paid to Mrs. Kelley for her interest in the property. To this counterclaim the plaintiff filed an answer, denying all the material allegations thereof, and to this answer the defendant Heinze filed a reply.

Upon the issues raised by the counterclaim, answer and reply,

the cause was tried to the court, sitting without a jury, and, upon the conclusion thereof, findings of fact and conclusions of law were made in favor of the defendant Heinze, and in July, 1901, a decree in accordance with the prayer of his counterclaim was entered. On March 18, 1902, the court made certain modifications of the decree. The appeals are from the decree, from the order overruling plaintiff's motion for a new trial, and from the order of the court modifying the decree.

Mr. W. W. Dixon, Mr. A. J. Shores, Mr. C. F. Kelley, Messrs. Forbis & Evans, Mr. D. Gay Stivers, and Mr. T. J. Walsh, for Appellant.

The evidence is too contradictory and uncertain to permit a court of equity to exercise the power of specific performance. In all cases of specific performance, the evidence must be clear, conclusive and satisfactory. (22 Enc. Pl. & Pr. 1075; *Baggs v. Bodkin*, 32 W. Va. 566; *Cutsinger v. Ballard*, 115 Ind. 93; *Purcelle v. Miner*, 4 Wall. 513; *De Sollar v. Hanscome*, 158 U. S. 216; *O'Connor v. Jackson*, 62 Pac. 761-762; *Printup v. Mitchell*, 17 Ga. 567; *Ricc v. Rigby*, 61 Pac. 290-294; *Brown v. Brown*, 33 N. J. Eq. 650; *Semmes v. Worthington*, 38 Md. 318; *Vanwert v. Chidester*, 31 Mich. 208; *Banks v. Weaver*, 48 Atl. 515; *Pomeroy on Specific Performance of Cont.* 510; Civil Code, Secs. 4280, 2035, 4417, 2160, 4419, 3930; *Magee v. McManus*, 70 Cal. 553; *Burnett v. Kullok*, 76 Cal. 535; 22 Am. & Eng. Ency. of Law, 1031; *Adams' Equity*, 78-79; Note to *Seymour v. Delancy*, 15 Am. Dec. 270, 299; 2 *Pomeroy's Eq. Juris.* 926-927; *Morrill v. Everson*, 77 Cal. 114; *Windsor v. Miner*, 124 Cal. 492; *Prince v. Lamb*, 128 Cal. 120; *Stiles v. Cain*, 66 Pac. 231; *Nicholson v. Tarpey*, 70 Cal. 608; *Foster v. Elk Fork Co.*, 90 Fed. 178-181; *Federal Oil Co. v. Western Oil Co.*, 112 Fed. 373-376; *Addison on Contracts*, Sec. 9; *Clark on Contracts*, 148; *Browne on Statute of Frauds*; *Phillips v. Thompson*, 1 Johns. Ch. 131; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 372; *Warvelle on Vendors*, 705, 693.)

The contract, if not indefinite, is too incomplete for enforcement. (Pomeroy on Contracts, Sec. 154; *Smith v. Burnham*, Fed. Cas. 13,019.)

There being no mutuality in the contract it cannot be specifically enforced. (Civil Code, Sec. 4412; *Wakeham v. Barker*, 22 Pac. 431; *Schroeder v. Geminder*, 10 Nevada, 364; *Hall v. Center*, 40 Cal. 66; *Hawralty v. Warren*, 18 N. J. Eq. 134; *Johnston v. Trippe*, 33 Fed. 530; Lindley on Mines, Sec. 859; *Watts v. Keller*, 56 Fed. 1; *Conrad v. Rust*, 11 N. W. 265; *Geiger v. Green*, 13 Morrison's Min. R. 324; *Sturgis v. Galindo*, 59 Cal. 28; *Stanton v. Singleton*, 126 Cal. 657; *Marble Co. v. Ripley*, 10 Wall. 359; *Federal Oil Co. v. Western Oil Co.*, 112 Fed. 373; *Bromley v. Jefferies*, 2 Vernon, 415; *Jones v. Williams*, 37 L. R. A. 682-706.)

The contract is against public policy and void. (Clark on Contracts, 429; Penal Code, Sec. 320; *Johnston v. Shrewsbury*, 3 De G. M. & G.; *Mayger v. Cruse*, 5 Mont. 495; Frye on Specific Performance, 456, p. 222; 15 Am. & Eng. Ency. of Law, 2d Ed., 927; Bliss on Code Pleading, Sec. 351.)

No part performance of the contract has been shown. The contract relied upon is within the statute of frauds, being by parol, and is not enforceable except a part performance is shown. (Pomeroy on Contracts, Secs. 120, 107, 116, 104, 106; *Wright v. Packett*, 22 Gratt. 370; *Ackerman v. Fisher*, 57 Pa. St. 457; *Iron Age Pub. Co. v. W. U. Tel. Co.*, 83 Ala. 498; 20 Ency. Pl. & Pr. 435; 3 Pomeroy's Equity, Sec. 1409, note, p. 2174; *Bennett v. Dyer*, 35 Atl. 1004; 2 Pomeroy's Equity, 803, 807; *Burns v. Daggett*, 6 N. E. 727; *Cooper v. Thomason*, 45 Pac. 299; 2 Beach's Equity Juris. 617; *Foster v. Maginnis*, 89 Cal. 264; *Cooper v. Great Falls*, 30 S. W. 353; *Boulder v. Farnham*, 12 Mont. 1; *Colson v. Thompson*, 2 Wheat. 336-341; 22 Am. & Eng. Ency. of Law, 1006; Mechem on Agency, 718-719; *Fowler v. Sutherland*, 68 Cal. 414; *St. Louis v. Montana Co.*, 113 Fed. 900; Browne on Statute of Frauds, 490; *Wach v. Sorber*, 30 Am. Dec. 269; *Barrett v. Geisinger*, 35 N. E.

354-357; *Eckert v. Eckert*, 3 Penrose & W. 332-360; 2 Warvelle on Vendors, 786, 782; *Detrich v. Sharar*, 5 Pa. St. 521, 523; Pomeroy on Contracts, Sec. 114; *Phillips v. Thompson*, 1 Johns. Ch. 149; *Williams v. Morris*, 95 U. S. 457; *Blum v. Robertson*, 24 Cal. 128-143; *Stoddard v. Bowie*, 4 Md. Ch. 482; *Ogsbury v. Ogsbury*, 115 N. Y. 290; *Ducy v. Ford*, 8 Mont. 239; *Wheeler v. Reynolds*, 66 N. Y. 228.)

The defendant in his answer set up that Finlen had forfeited his rights under the leases and bonds, and undertook to prove the fact by testimony; this defeats the defendants' right to a specific performance of the contract. (*Willison v. Watkins*, 3 Peters, 43; Bigelow on Estoppel, 547; *Fears v. Merrill*, 50 Am. Dec. 229; *Conrad v. Lindley*, 2 Cal. 174; *Hicks v. Lavell*, 64 Cal. 20; *Pearis v. Covillaud*, 6 Cal. 617; *Whittier v. Stege*, 61 Cal. 239; *Thorne v. Hammond*, 46 Cal. 530; *Brown v. Covillaud*, 6 Cal. 566; *Green v. Covillaud*, 10 Cal. 317; *Willard v. Taylor*, 8 Wall. 557; *Kennedy v. Hazellon*, 128 U. S. 667.)

The cross-bill is insufficient. (Code of Civil Procedure, Sec. 1895; 20 Ency. Pl. & Pr. 458; 3 Pomeroy's Equity, 1408; *Wenham v. Switzer*, 59 Fed. 947; Bliss on Code Pleading, 351; *Arguello v. Bours*, 67 Cal. 450; *Dorris v. Sullivan*, 90 Cal. 286.)

There is a variance between contracts as pleaded and as proven. (*Iron Age Pub. Co. v. W. U. Tel. Co.*, 83 Ala. 498; *Brown v. Brown* (Mich.), 11 N. W. 205; 2 White & Tudor's Leading Cases in Equity, Pt. 1, 1027; *Allen v. Young*, 6 So. 747; *Madge v. McManus*, 70 Cal. 553; Browne on Statute of Frauds, Chapt. 9; *Fuller v. Reed*, 38 Cal. 99.)

Plaintiff is entitled to a new trial on the ground of irregularity in the proceedings of the court and of the adverse party, through which plaintiff was prevented from having a fair trial. (Code of Civil Procedure, Sec. 1171; 14 Ency. Pl. & Pr. p. 721; Hayne on New Trial & Appeal, 64, 48; *Coswell v. State*, 49 Ga. 103; *Walker v. Walker*, 11 Ga. 203; *Walker v. Hunter*, 17 Ga. 414; *Springer v. State*, 34 Ga. 381; *Redmond v. Royal Ins. Co.*, 7 Phil. 167; *Keegan v. McCandless*, 7 Phil. 248;

Cottle v. Cottle, 6 Greenl. 140; *Ritchie v. Holbrooke*, 7 Serg. & R. 458; *Perkins v. Knight*, 2 N. H. 474; *McIntyre v. Hussey*, 57 Me. 494; *Hoffram v. Gallupe*, 55 Me. 565; *Turner v. Beardsley*, 17 Wend. 349; *Spire v. Nitkin*, 44 At. Rep. 13; *Whipple v. Preece*, 56 Pac. 296; *Peck v. Pierce*, 28 At. Rep. 524; *Morse v. M. O. P. Co.*, 105 Fed. 337; *Mattox v. U. S.*, 146 U. S. 140; *McDaniels v. McDaniels*, 40 Vt. 374; *Bradbury v. Cony*, 62 Me. 227; *Knight v. Freeport*, 13 Mass. 219; *Whitney v. Whitman*, 5 Mass. 405; *Kerr on Frauds and Mistakes*, 292; *Kemp v. Rose*, 1 Giff. 258; *Stoke v. Kuan*, 11 Wis. 407.)

The affidavits in support of the motion for new trial address to the court another question. There was another action pending in the United States court, begun sixteen days before this one, by Finlen against Devlin and others, asking specific performance, into which Heinze had come as an intervener, setting up the same facts in a cross-bill as he asserts in his cross-bill in this action; under these circumstances it was an abuse of discretion in the court to set this case down for trial. When two courts of coordinate jurisdiction both have before them actions involving the same issues between substantially the same parties, that court in which suit is last begun will stay its hand until a determination in the other court. (Freeman on Judgments, 118a; *Sharon v. Sharon*, 84 Cal. 430; *Bank v. Stevens*, 169 U. S. 432-439; *Powers v. Blue Grass Ass'n*, 86 Fed. 705-708; *Zimmerman v. So Relle*, 80 Fed. 417-420; *Farmers' L. & T. Co. v. Lake Street*, 177 U. S. 51-61; *Merriman v. Watson*, 38 Pac. 1108.)

The court erred in amending the decree. (*Morrison v. Dapman*, 3 Cal. 271; *De Castro v. Richardson*, 25 Cal. 49; *Scamman v. Bonslett* (Cal.), 50 Pac. 272; *Lees v. Freeman* (Utah), 57 Pac. 411; *Thompson v. Lynch*, 43 Cal. 483; *Hobbs v. Duff*, 43 Cal. 485; *Black on Judgments*, Sec. 165; *Parrott v. McDevitt*, 14 Mont. 203; *Montana Milling Co. v. Jefferies*, 16 Mont. 559.)

Messrs. McHatton & Cotter, Messrs. Toole & Bach, Mr. J. M. Denny, and Mr. Charles R. Leonard, for Respondents.

As to the affidavits filed by the plaintiff as in support of his motion for a new trial.

A new trial is only a statutory right; the right to move for it must be given by the statute and confined to the ground in the statute, and each subdivision of the statute is a separate and distinct ground and cannot be aided or supported by another ground, or matters pertaining to another ground, mentioned in the statute, but must stand or fall on its own assignment and the matters properly presented in support thereof. (Code of Civil Procedure, Sec. 1171; *Risse v. Gasch* (Neb.), 61 N. W. 616; *Townley v. Adams* (Cal.), 50 Pac. 550; *State v. Volaw*, 16 Mont. 308; *Froman v. Patterson*, 10 Mont. 107, 114; *McLeod v. Dickenson*, 11 Mont. 438; *State v. Mason*, 18 Mont. 362, 364; *Sullivan v. City of Helena*, 10 Mont. 134, 139; *Arnold v. Sinclair*, 12 Mont. 248, 259; *Valerius v. Richard*, 57 Minn. 443; *Burton v. Todd*, 68 Cal. 485; *State v. Fry*, 10 Mont. 409; *People v. Fair*, 43 Cal. 137; *People v. O'Brien*, 88 Cal. 488; *People v. Voll*, 43 Cal. 167; *People v. McCarty*, 48 Cal. 557, 559; *Brumagin v. Bradshaw*, 39 Cal. 25, 35; *Harding v. Vanderwater*, 40 Cal. 77, 83; *State v. Gawith*, 19 Mont. 48, 51; *Drexel v. Daniels* (Neb.), 68 N. W. 399; *Gregg v. Garrett*, 13 Mont. 10; *State v. Pilgrim*, 17 Mont. 311; *Lowe v. Lawrence*, 7 Neb. 192; *Gurner v. Dinsmore*, 8 Neb. 384; *Scoville v. Chapman*, 17 Ind. 470; *Horton v. Wilson*, 25 Ind. 316; *Fitch v. Bunch*, 30 Cal. 208; *Boston Tunnel Co. v. McKenzie*, 67 Cal. 485; *Mazkewitz v. Pimentel*, 83 Cal. 450; 14 Ency. Pl. & Pr. 884, and cases cited in notes; *Ex parte Gibson*, 31 Cal. 620, 625; *Pico v. Cohn* (Cal.), 13 L. R. A. 336.)

The affidavits were incompetent, irrelevant and immaterial, and not such as could or should be considered. (Code of Civil Procedure, Secs. 3228, 3229, 3124; *Wetzstein v. B. & M. Co.*, 66 Pac. 943, 947; *Bartlett v. U. S.*, 106 Fed. 884; *Wagoner v. Wagoner* (Md.), 10 Atl. 221; *Clear v. Clear*, 19 N. J. Eq. 37;

State v. Carroll, 85 Iowa, 1; *State v. Tosney*, 26 Minn. 262; *Cline v. Cline* (Ore.), 16 Pac. 282; *Van Voorhis v. Van Voorhis*, 94 Mich. 60; *Bradshaw v. Degenhart*, 15 Mont. 267, 273; *People v. McCoy*, 71 Cal. 398; *Bulliner v. People*, 95 Ill. 394; 12 Ency. Pl. & Pr. 623; *Berry v. DeWitt*, 27 Fed. 723; *Davis v. Allen*, 11 Pick. 468; *Fessenda v. Sayer*, 53 Me. 536; *Hunter v. Georgia*, 43 Ga. 483; *Arhart v. Stark*, 31 N. Y. S. 871; *Wynn v. Ry. Co.*, 17 S. E. 649.)

The trial court has the right to decide the question of irregularity or misconduct on the part of the court or the judge, or on the part of the jury, its decision has the same controlling effect in each instance, and ought to be given, and is entitled, to greater weight when it passes upon and disposes of a charge of irregularity or misconduct against itself or its judge than when it passes upon a like question with reference to the jury, for the reason that it has a better knowledge of the same—in fact, it must have personal knowledge in the one, where, in the other, it must exercise its judgment upon matters which are only brought to its attention by way of affidavit, and in instances in which, most frequently, a conflict or contradiction exists in the affidavits with reference to the fact. The judge has a right to insert in a bill of exceptions a statement that the matters complained of are not true, and thus dispose of the contention. (*People v. Azoff*, 105 Cal. 632, 39 Pac. 59, at 61.)

The irregularity or misconduct on the part of the jury are questions of fact to be determined by the trial court, and its determination thereof is final and not subject to revision on appeal. (*People v. Sullivan*, 129 Cal. 557, 62 Pac. 101, 103; *Hull v. Minneapolis St. Ry. Co.* (Minn.), 67 N. W. 218; *Peterson v. Faust* (Minn.), 14 N. W. 64; *Tierney v. Minneapolis & St. L. Ry. Co.* (Minn.), 23 N. W. 229; *Thompson v. Anderson* (Ia.), 63 N. W. 355; *Light v. Chicago, M. & St. P. Ry. Co.* (Ia.), 61 N. W. 380; *Morgan v. Ross*, 74 Mo. 318; *Gordon v. Trevarthan*, 13 Mont. 387, 389; *Hill v. Corcoran*, 15 Colo. 270, 25 Pac. 171.)

The same rule applies generally with reference to affidavits

on the ground of newly discovered evidence, where there is a conflict in the affidavits. (*Nyhart v. Pennington*, 20 Mont. 158, 162; *Territory v. Burgess*, 9 Mont. 57, at 80; *Holland v. Huston*, 20 Mont. 84.)

The affidavit of a juror is admissible to disprove misconduct and support his verdict. (*People v. Azoff*, 105 Cal. 632, 39 Pac. 59; *Saltzman v. Sunset T. & T. Co.*, 125 Cal. 501, 58 Pac. 169; *State v. Anderson*, 14 Mont. 541, 545; *State v. Jackson*, 9 Mont. 508, 522; *Kerr v. Lunsford* (W. Va.), 2 L. R. A. 668, 679.)

Where irregularity is charged on the part of the court and is disputed by counter-affidavits, the order denying a new trial will not be disturbed. (*People v. Wynn*, 133 Cal. 72, 65 Pac. 126.)

The party alleging error in refusing to grant a new trial must make the error affirmatively appear—must show an abuse of discretion. (*Mason v. Germaine*, 1 Mont. 263, 270; *Higley v. Gilmer*, 3 Mont. 433.)

The irregularity mentioned by the statute must be such as prevented a fair trial. It therefore rests on the person alleging irregularity to show affirmatively not only the irregularity complained of, but that injury resulted therefrom. (*State v. Gay*, 18 Mont. 51, 80; *Territory v. Burgess*, 9 Mont. 57, 81; *State v. Anderson*, 14 Mont. 541, 545; *Territory v. Hart*, 7 Mont. 489, 505; *Bradshaw v. Degenhart*, 15 Mont. 267, 272.)

Where the interference is by strangers and it does not appear that injury has been done, a new trial will be refused. (*People v. Boggs*, 20 Cal. 432, 436; 12 Ency. Pl. & Pr. 610, 619, and notes; *People v. Symonds*, 22 Cal. 349; *Clay v. Montgomery*, 102 Ala. 297; *Tiernan v. Trewick*, 2 Utah, 393, 397.)

The finding of the court is conclusive as to the affidavits and the statements contained therein. (*Bank v. Gagnon*, 25 Mont. 268.)

With reference to cases tried before a court, a different rule applies than to cases tried before a jury. (*Bank v. Greenhood*, 16 Mont. 449.)

Appellant contends that, irrespective of whether or not any prejudice is shown, the fact that conversations were had would be sufficient to justify the granting of a new trial. Appellant is mistaken. (*Koester v. Ottumwa*, 34 Ia. 41; *People v. Leary*, 39 Pac. 24; *U. S. v. Reid*, 12 How. 361; *Pittsburg Ry. Co. v. Porter*, 32 Ohio St. 328; *Bradshaw v. Degenhart*, 15 Mont. 270.)

There is no public policy and no principle of right which would justify the setting aside of a correct and just decision for the purpose of administering a lesson, or for the purpose of punishing a party for improper conduct. (*Forrester et al. v. Boston & Montana, etc. Co.*, 23 Mont. 129; *State v. Clancy*, 61 Pac. 987.)

It was certainly proper for the lower court to determine that the affidavits presented by the appellant were false, and it did so, and the same being false, irrelevant and immaterial, were also impertinent, scandalous and contemptuous, and it was within the authority of the court to strike the same from the files. We ask this court to order the same expunged from this record. (*Powell v. Caine*, 5 Paige, Ch. 265; *Opdyke v. Marble*, 18 Abb. Prac. 376; 19 Ency. Pl. & Pr. 219; *People ex rel. Thomas v. Berry et al.*, 17 Colo. 322, 29 Pac. 904; *People v. Green*, 9 Colo. 506, 13 Pac. 514; *Van Etten v. Butt*, 32 Neb. 285, 49 N. W. 365; *Green v. Elbert*, 137 U. S. 615; *Kelley v. Bottcher*, 85 Fed. 55, s. c., 82 Fed. 794; *Cassidy v. County of Palo Alto* (Ia.), 12 N. W. 231; *Diamond Tunnel, etc. Co. v. Faulkner* (Colo.), 28 Pac. 472; *Ganzer v. Schiffbauer* (Neb.), 59 N. W. 98; *State v. Kennedy* (Neb.), 83 N. W. 87; *Brownell v. McCormick*, 7 Mont. 12; *Anderson v. Cook*, 25 Mont. 340; *Sharp v. Hoffman*, 79 Cal. 404; *Gage v. Gunther*, 136 Cal. 340.)

MR. JUSTICE HOLLOWAY, after stating the case, delivered the opinion of the court.

1. It is contended that the evidence is insufficient to justify the findings of the court. An examination of one of the specifications, wherein the evidence is claimed to be insufficient, will

suffice for all, for they are in substantially the same form. "(1) The evidence is insufficient to justify the finding that on the 21st day of November, 1898, or at any time, the plaintiff orally assigned, conveyed, or set over to the defendant, F. Augustus Heinze, all or any of the leases or agreements referred to in the complaint and attached thereto as exhibits, or all of his right, title, interest or claim thereunder to the Minnie Healy lode mining claim." This is merely saying that the evidence is insufficient to justify finding No. 1 as made by the court, and is in no sense a compliance with the provisions of Section 1173 of the Code of Civil Procedure, which provides, among other things: "* * * When the notice of motion (for a new trial) designates as the ground of the motion the insufficiency of the evidence to justify the verdict or other decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient. * * * If no such specifications be made the statement shall be disregarded on the hearing of the motion. * * *"

In construing Section 695 of the California Code of Civil Procedure, identical with our Section 1173 above, and in discussing specifications in effect the same as those found in this record, the supreme court of that state, in *Eddelbuttel v. Durrell*, 55 Cal. 277, says: "In the case before us there is not even an attempt made to specify the particulars in which the evidence is alleged to be insufficient to sustain the findings of the court below. Appellants might as well have said, in a general way, that none of the findings of the court were sustained by the evidence. The purpose of the statute is apparent. It was to direct the attention of court and counsel to the particulars relied on by the moving party, to the end that the evidence bearing on the specifications of error might be inserted in the statement and considered by the court." To the same effect is the decision in *Parker v. Reay*, 76 Cal. 103, 18 Pac. 124.

In *King v. Lincoln*, 26 Mont. 157, 66 Pac. 836, the court said: "It is contended that the evidence is insufficient to justify the verdict. We cannot examine the evidence to determine

whether this contention is well founded, for the reason that the statement used in support of the motion for a new trial fails to specify the particulars wherein the evidence is insufficient. The only specification found in the statement is the following: 'The evidence is insufficient to support the verdict of the jury in finding for the plaintiff in the sum of ninety-five and 70-100 dollars, with interest. Said verdict is contrary to the evidence.'

* * * As an attempt to point out any particular in which the evidence failed, or the absence of any material fact to warrant the jury in finding as they did, as is contemplated by the statute (Code of Civil Procedure, Sec. 1173), it is inexcusably insufficient (*Zickler v. Deegan*, 16 Mont. 198, 40 Pac. 410; *Hayne*, New Trial & App. Sec. 150), and the trial court was justified in ignoring it. It amounts to no more than a repetition of the ground for a new trial required to be stated in the notice of intention." See, also, *First National Bank v. Roberts*, 9 Mont. 323, 23 Pac. 718. We must assume, then, that the district court properly disregarded the statement in considering this ground of the motion for a new trial, and we decline to review the matter here.

2. It is next contended that the counterclaim is insufficient in that it does not allege that Finlen received an *adequate* consideration, and it is earnestly urged that an allegation that the consideration which passed was *adequate* is absolutely necessary. It is further contended that in any event the consideration alleged is in fact inadequate, and for that reason the contract ought not to be enforced. We are of the opinion that, if the counterclaim stopped short with an allegation that the consideration passing from Heinze to Finlen was *adequate*, it would be wholly insufficient as pleading a conclusion of law.

In *Mayger v. Cruse*, 5 Mont. 485, 6 Pac. 333, it is said: "The court, in such a case as this, when called upon to exercise the high power of compelling the execution of a contract *in specie*, should be informed of the entire nature and character of the contract, so as to determine for itself whether or not it is one which good conscience should enforce, free from objection,

and fair, just and reasonable, and equal in all its parts. The statement that 'the services were a fair and reasonable compensation for the interest so to be acquired' is the statement of a conclusion of law. The facts showing the character of the consideration should be before the court in this case before it should be called upon to say that such a contract is fair, just and reasonable in all its parts."

Notwithstanding our Code is similar to that of California, and may have been taken from that state, we decline to follow California decisions upon this subject when they are in direct conflict with the decisions of our own court and are opposed to what appears to us to be the better reasoning.

Section 4417 of the Civil Code provides: "Sec. 4417. Specific performance cannot be enforced against a party to a contract, in any of the following cases: (1) If he has not received an adequate consideration for the contract. (2) If it is not, as to him, just and reasonable. (3) If his assent was obtained by the misrepresentation, concealment, circumvention or unfair practices of any party to whom performance would become due under the contract, or by any promise of such party, which has not been substantially fulfilled; or (4) if his assent was given under the influence of mistake, misapprehension or surprise, except that where the contract provides for compensation in case of mistake, a mistake within the scope of such provision may be compensated for, and the contract specifically enforced in other respects, if proper to be so enforced." The evident meaning of this section is that any one of these subdivisions furnishes a defense to an action for specific performance; in other words, when specific performance is sought against a party he may interpose any one of the defenses named above, and if he can maintain it, he defeats the action. The burden of proof as to such defense is upon him who asserts it, and, while it is necessary for defendant Heinze to set forth the consideration for the contract sought to be enforced, the burden is then upon the plaintiff to show that such consideration is inadequate, if he would avail himself of that defense. Such was the rule at com-

mon law, and, in the absence of a statute fixing the burden of proof, the common-law rule prevails. (Section 5152, Political Code.)

However, laying aside the question of the burden of proof as to the adequacy of consideration, we are to consider the allegations of the counterclaim in the light of the surrounding circumstances.

In *Morrill v. Everson*, 77 Cal. 114, 19 Pac. 190, it is said: "We do not doubt that the point of time to which the question of adequacy must relate is the time of the formation of the contract." This is clearly the correct rule, and it is then quite immaterial what value the option to purchase the Minnie Healy claim had at any time subsequent to November 21, 1898, the date of the agreement as found by the court. The increased value of the property, occasioned by the discovery of valuable ore bodies or from any other cause, cannot be considered in determining the question of the adequacy of the consideration which passed from Heinze to Finlen for his (Finlen's) interest in the property. In his reply to the defendant's answer, plaintiff, Finlen, says: "Admits that at the time the defendant (Heinze) took possession of said claim there was no ore of commercial value exposed therein." Upon cross-examination the plaintiff testified: "I had spent in the neighborhood of \$70,000 on the Minnie Healy prior to November 21, 1898." In his answer to Heinze's counterclaim, the plaintiff admits "that he stated that he was desirous of transferring and assigning said leases and agreements." Upon his cross-examination he further stated that he had made a deposition in this same case prior to the date of the trial, in which he was asked this question: "Q. Isn't it a fact, Mr. Finlen, that there was no ore extracted from the Minnie Healy mine during the year 1898 by you? A. I don't remember; I don't suppose there were. But if there were, it was a small complement.' I expect I made that statement. That is the fact as I remembered it at that time. * * * I expect that is correct; is what I say about it now. The facts were fresher at that time, in 1900, than at

the present time." The witness Mahoney testified that he went to work on the claim for Heinze about December 23, 1898. With reference to the condition in which he found the mine, he says: "At the time I went there the tracks were all taken up and everything had the appearance of the mine being abandoned. * * * I had to put in a track on every level, clean up all the debris and places there where it was filled clear to the roof. * * * I had been acquainted with the Minnie Healy mine for a long time prior to the time I took charge there on the 23d of December, and, from my knowledge of it, it had not been a paying mine. There never was ore taken out sufficient to pay for the mining of it, or anywhere near it; there was scarcely any taken out at all. * * * There had been considerable development work done in the meantime. I was aware that there were quite a number of parties worked it, and threw it up, as it wouldn't pay. The Butte & Boston spent considerable money on it, and some other parties."

These were the conditions known to the parties at the time of their negotiations, and constitute the circumstances surrounding them, and which entered into their agreement. Notwithstanding the claim was situated contiguous to paying properties, the plaintiff had expended a large amount of money, was unable to expose any commercial ore, had removed the tracks, for some time had done no mining in the property, and was anxious to dispose of his option on it. As found by the court, the defendant Heinze agreed to go into possession of the property, work the same, keep the leases and bonds in full force and effect, and, if the property appeared to him to justify its purchase, he was to pay Finlen \$54,000. This was one of the hazardous risks in mining operations. Finlen was already out at least \$54,000, and this afforded him an opportunity to recover it without further outlay or risk, and in the meantime to have the leases and bonds kept alive at the expense of another party. On Heinze's part, he assumed the risk of losing whatever means he employed in exploring the property, or of making discoveries which Finlen had not been able to make, and securing to himself

the option to purchase a property which might be fabulously rich, or in the end a losing venture. In view of all these surrounding circumstances, we cannot say that the consideration pleaded in the counterclaim as passing from Heinze to Finlen was inadequate, or the agreement set forth, on its face, unjust or unreasonable.

3. It is next contended that, if the contract as found by the court was actually made between the plaintiff and the defendant Heinze, it is against public policy and void, and specific performance thereof will not be enforced. This is predicated upon the finding of the court that a part of the consideration for the agreement of November 21, 1898, was that Finlen should prosecute an action against the Boston & Montana Company in his own name, and secure an injunction against that company from further mining upon a vein which it was claimed had its apex in the Minnie Healy claim, and on its dip departed so far from the perpendicular that it passed without the side lines of that claim and into the property operated by the Boston & Montana Company; that Heinze should pay all the expenses of such litigation, and should have whatever proceeds were realized therefrom.

Section 2240 of the Civil Code reads as follows: "That is not lawful which is: (1) Contrary to an express provision of law. (2) Contrary to the policy of express law, though not expressly prohibited; or (3) Otherwise contrary to good morals." Apparently the theory upon which the appellant proceeds is that Finlen and Heinze entered into a conspiracy against the Boston & Montana Company, or that Heinze was guilty of champerty or maintenance. Section 320 of the Penal Code makes it a misdemeanor for two or more persons to conspire falsely to maintain any suit, action or proceeding; and if this agreement of November 21, 1898, comes within the meaning of that section, then it is contrary to an express provision of the law, and will not be enforced. As was said in *Mayger v. Cruse, supra*: "The contract should not admit of doubt or suspicion; for example, as to its mutuality, as to its being one not

opposed to public policy, or one illegal in its nature." "Maintenance" is defined to be an officious intermeddling in a suit that in no way belongs to one, by maintaining or assisting either party, with money or otherwise, to prosecute or defend it. (6 Cyc. 851.) "Champerty," which is a species of maintenance, has been defined to be the unlawful maintaining of a suit, in consideration of some bargain to have a part of the thing in dispute or some profit out of it, the champertor agreeing to carry on the suit at his own expense. (6 Cyc. 850.) Where, however, the person promoting the suit of another has any interest in the subject-matter, whether it be legal or equitable, great or small, vested or contingent, certain or uncertain, it affords him just reason for participating in the suit, and does not subject him to the charge of officious intermeddling with matters in which he has no interest, or bring his agreement respecting the same within the definition of champerty or maintenance.

The evidence tended to show that prior to November 21, 1898, Finlen had made some explorations in the Minnie Healy claim to ascertain whether or not the mining operations carried on by the Boston & Montana Company through the Leonard shaft were upon a vein having its apex within the Minnie Healy claim, and that Finlen himself had talked about bringing a suit in his own name against that company for the alleged trespass. This condition prevailed when the agreement of November 21, 1898, was entered into. Finlen transferred to Heinze an option to purchase under the option which he (Finlen) had on the property, and thereby Heinze acquired, and Finlen still retained, a contingent interest in the property, the subject-matter of the controversy. Finlen apparently had some reason for believing that the Boston & Montana Company was extracting ores from veins belonging to the Minnie Healy claim, and Heinze, from his examination of the property, thought the suit might be maintained successfully. So far as anything to the contrary appears in the record, either Finlen or Heinze might have prosecuted the suit in perfect good faith, and therefore the essential element of a "conspiracy," as defined by Section 320

above, was absent, while the interest of each in the property, the subject-matter in controversy, was such as to take the agreement out of the definition of champerty or maintenance. (*Knight v. Sawin*, 6 Me. 361; *Lord v. Dale*, 12 Mass. 115, 7 Am. Dec. 38.) It is apparent, however, that there is a material variance between the contract pleaded and the one proved. No mention is made in the counterclaim of any agreement by Finlen to commence this action, while the court finds that that was a part of the consideration for the contract sued upon.

4. The appellant contends that defendant Heinze cannot have specific performance of the alleged agreements, for the reason that in his answer to the plaintiff's complaint he (Heinze) alleges that prior to November 21, 1898, the plaintiff had forfeited all rights which he had under the agreements or any of them. But the cause now before us was tried upon the issues raised by the counterclaim and the answer thereto. That defense was interposed to the complaint, which was for the recovery of the possession of the Minnie Healy claim, and was an action at law; while the matter before us is a suit in equity, in effect instituted by the filing of the counterclaim, and the only pleadings before us are the counterclaim, the answer thereto, and the reply. The question is therefore not properly before us. We are not to be understood by this as saying that such apparently inconsistent defenses cannot be pleaded. Upon this we express no opinion.

5. Numerous errors are assigned upon the action of the court in admitting certain testimony which it is now claimed was irrelevant and immaterial. But the cause was tried to the court sitting without a jury, and the presumption must be indulged that such evidence, if improperly admitted, was not considered in arriving at a conclusion. The evidence against the admission of which no objection was made appears to be sufficient to sustain the findings of the court.

In *Montana Ore Purchasing Co. v. Butte & Boston Consol. Mining Co.*, 25 Mont. 427, 65 Pac. 420, this court said: "The court admitted, over the objection of the plaintiff, evidence

tending to show the character of the buildings which the defendants were engaged in erecting, and the amount intended to be expended thereon. Counsel for appellant contend that this evidence was irrelevant and immaterial, and that the action of the trial court in admitting it was prejudicial. We are not prepared to say that the evidence was not properly admitted, but, conceding that plaintiff's position is correct, we think the error without prejudice. Presumably the trial court based its findings upon such of the evidence before it as was competent, excluding from consideration such as had no weight or relevancy. The other evidence in the record, the competency of which is unquestioned, was sufficient to justify the findings, and the order will not therefore be reversed."

6. Upon cross-examination of the witness McHatton for the defendant Heinze, he was asked whether or not he had dictated a particular paragraph of the complaint in the suit of *Finlen v. Boston & Montana Company*. An objection to the question was sustained. An examination of the record shows that, just before this question was asked the witness, he had testified that he did dictate the pleadings on behalf of the plaintiff in that cause. So that the question, even if proper, had been answered, and we cannot say that the court committed error in refusing to permit a repetition.

As a part of this cross-examination it was also sought to introduce the pleadings in that case, but an objection to their admissibility was sustained. However, the plaintiff has not included the pleadings thus offered in the statement on motion for a new trial, and we are unable to say whether or not any error was committed in the court's ruling. (*Haupt v. Simington*, 27 Mont. 480, 71 Pac. 672; *Tague v. John Caplice Co.*, 28 Mont. 51, 72 Pac. 297.)

We have examined the other errors specified upon the orders made by the court in excluding certain evidence, but find no merit in them.

7. The decree in this suit was entered in July, 1901. On March 18, 1902, the court modified the decree by adding to one

paragraph the following: "Jurisdiction with reference to the injunction and all matters pertaining thereto being retained by the court on the motion and application of the plaintiff herein." Appellant complains that the amendment was made without any showing whatever, over the objection of the plaintiff, and not on his motion, and that it was unauthorized. Upon the application made to this court for an injunction pending the appeal herein (*Finlen v. Heinze*, 27 Mont. 107, 69 Pac. 829), this court had occasion to consider somewhat that amendment, and with reference to it said: "In our opinion, the particular amendment in question was wholly unauthorized, no matter at whose instance it was made, or what evidence there was tending to show that the matter contained in the amendment was in fact a part of the decree as rendered in the first instance. When that court rendered its final judgment, at the conclusion of the case, settling the rights of the parties, its jurisdiction over the subject-matter and the parties ceased, except for the purpose of entertaining a motion for a new trial, or such other proceedings as might properly and lawfully be had looking to a revision or correction of its action, or to enforce the decree as rendered. It had no authority, inherently or by statute, or by any rule of this court, to retain jurisdiction for any purpose pending the appeal." We adopt that language as expressing our views upon the matter at this time.

8. The appellant has filed herein a so-called "brief," consisting of 283 pages, and the respondent, not to be outdone, has filed one of 422 pages. These consist of long arguments, extended excerpts from reported cases, and matters which have no proper place in a brief. Much of them is repetition, and, instead of materially aiding the court in a determination of this cause, they have imposed a prodigious amount of needless labor, and have been of little, if any, practical assistance. Such an imposition upon the court ought to be rebuked by striking the so-called "briefs" from the files, and ordering briefs which in substance and extent come within the meaning of that term to be filed instead. In this instance the prevailing party will not

be permitted to recover, as part of his costs, the expense of printing his so-called "briefs."

9. It is next contended that the district court erred in refusing the plaintiff a new trial. The notice of intention to move for a new trial, which furnishes the basis for all subsequent efforts to have the decision set aside, specifies the following, among other grounds: "(1) Irregularity in the proceedings of the court, and irregularity in the proceedings of the adverse parties, whereby the plaintiff was prevented from having a fair trial."

The record contains a number of affidavits filed on behalf of the plaintiff in support of his motion. These contain recitals which, if true, demonstrate that the district judge who tried this cause was completely lost to all sense of decency and propriety, and that he made of the occasion, while off the bench, a carnival of drunkenness and debauchery, in company with a female employe of the Montana Ore Purchasing Company, one of the defendants to the action. It is charged in these affidavits that, during the time this cause was on trial and undetermined, numerous written messages passed between Mrs. Brackett, the employe referred to, and Judge Harney; that on May 9, 1901, the so-called "dearie" letter was written by Mrs. Brackett and delivered to Judge Harney. A copy of the letter is attached to and made a part of the affidavits. This letter, profuse in the expressions of the writer's affection for Judge Harney—a married man living with his family—would hardly be considered a proper court record, but for its direct allusion to this suit then being tried, and for the significance of the answer thereto, which, it is charged, was written by Judge Harney, addressed to Mrs. Brackett, and, at the judge's request, delivered to her. The opening statement of that letter is as follows:

"My Dear Mrs. Brackett:

"I have received your letter and will be glad to talk further with you on the subject therein mentioned. On account of pain in my ankle I did not sleep last night. I have been listening

to arguments concerning the Minnie H. and they will probably consume all of tomorrow. I will see you tomorrow evening if you are at leisure. I have some matters that I must attend to this evening. I appreciate your solicitude and your feelings, which are reciprocated, as you know, and I beg you not to be uneasy."

When it is considered that the so-called "dearie" letter contains an offer of financial assistance to Judge Harney, reminds him who his friends were before he was "Judge" Harney, contains the statement that as to his future after he leaves the bench she is empowered to promise him certain things which will assure that most generously, and then refers to a statement which she says Judge Harney made to her respecting the evidence in this case, the full import of the answer is apparent. There is absolutely nothing in that so-called "dearie" letter which could with any show of propriety be the proper subject of discussion between the judge trying a cause and an employee of one of the parties to the action, and yet the answer thereto is an open invitation to Mrs. Brackett to discuss further the subject-matter of her letter. Judge Harney did give countenance to the charges made against him to the extent of denying one or two of the specific matters alleged, but his affidavit is most remarkable for what it does not say. The affidavits filed on behalf of the plaintiff set forth, with great particularity of time and place, numerous instances of the judge's association and revelry with Mrs. Brackett in Butte and elsewhere during the time the cause was being tried and determined, and it does seem most remarkable that, having made an affidavit, Judge Harney should have signally failed to deny the specific charges made against him, and notably failed to deny that he wrote the answer to the so-called "dearie" letter. It may be that no wrong was done in this instance, but, if so, the record before this court for review is in a most unfortunate condition.

The cause was tried to the court sitting without a jury, the judge performing the dual office of court and jury, and having the determination of all questions involved, both of law and fact.

If the cause had been tried to a jury, and a record was presented here containing like charges of irregularity by or on behalf of one of the parties in attempting to influence a single juror, it is hardly conceivable that this court would hesitate for a moment to set aside the verdict, if in favor of the offending party. Upon this subject the courts have been of one opinion.

In *Huckell v. McCoy*, 38 Kan. 53, 15 Pac. 870, where the attorney for one of the parties, in his closing remarks to the jury made use of improper language, the verdict in favor of his client was set aside.

In *Vollrath v. Crowe*, 9 Wash. 374, 37 Pac. 474, the plaintiff and one of the jurors were playing cards and drinking together in a saloon, and out walking together, and talking—though not about the case—during the time of its trial, and a verdict for the plaintiff was set aside, and with respect to the matter the court said: "Trials of causes should have the appearance of fairness, and it would tend greatly to bring judicial proceedings into disrepute if matters of this kind should be overlooked or tolerated. We fully agree with the contention of appellants that a verdict rendered by a jury, a portion of whom are found to have been promenading the street, conversing, playing at cards and drinking with the successful litigant, has the appearance of anything but fairness; and let it once be understood that such things are permissible, and we will be treated to the spectacle of litigants vying with each other, in both private and public places, in attempts to win the good will and favor of the jury, and the administration of the law greatly scandalized thereby."

In *Wright v. Eastlick*, 125 Cal. 517, 58 Pac. 87, one of the jurors attended a dance with a party to the action. The two drank together, and appeared intimate. A verdict for the offending party was set aside, the court saying: "In the early 60's a district judge in this state, whose district embraced mining counties, was impeached on the ground, among others, that during the trial of a cause he left the bench and visited a saloon,

and there drank and caroused with witnesses and the parties, or one of the parties."

Nothing herein said shall be construed as intimating an opinion by this court that any of the defendants had actual knowledge of what Mrs. Brackett was doing; but her principal was a corporation, which acts only through individuals, and the rule is uniform that irregularities on the part of an agent, employe, relative or interested friend, will be imputed to the principal.

In Thompson on Trials, Sec. 2560, it is said: "The rule is applied with almost equal stringency whether such attempts proceed from the prevailing party himself, from his friends, or from officious third persons."

In *Bradbury v. Cony*, 62 Me. 223, 16 Am. Rep. 449, it was charged that the son of the defendant had taken some of the jurors and showed them the property in controversy. A verdict for the defendant was set aside therefor.

In *Palmer v. Utah Northern Ry. Co.*, 2 Idaho, 291, 13 Pac. 425, the father of one of the plaintiffs, and the grandfather of another, during the time the cause was being tried, visited and patronized a saloon owned by one of the jurors, and, though in his affidavit he said that he had been patronizing the same saloon for the past six years, a verdict for the plaintiffs was set aside therefor. The court said: "We are unable to say what effect this liberal and conspicuous patronage during the trial may have had upon the mind of the juror whose bar he was patronizing. It is not necessary for us to find that it had effect upon the verdict, in order to sustain this assignment of error as to irregularities of an adverse party. It is enough to find that it was calculated so to do. It is perhaps impossible for the juror himself to appreciate what influence this patronage may have had upon his mind."

In *Burke v. McDonald*, 2 Idaho, 1022, 29 Pac. 98, the superintendent of the defendant furnished some refreshments to and drank with the jurors, and a verdict for his principal was set aside therefor.

In *McDaniels v. McDaniels*, 40 Vt. 364, a friend of the prevailing party had talked with a juror about the case, and the verdict was set aside.

In *Nesmith v. Insurance Co.*, 8 Abb. Prac. 141, a third party attacked the credibility of a witness for the defendant in the presence of jurors, and a verdict for the plaintiff was set aside.

In *Knight v. Freeport*, 13 Mass. 218, a son-in-law of one of the parties talked to a juror, and told him that the case was one of great consequence to him, and the verdict was set aside.

Whatever may be said as to the authorship of the so-called "dearie" letter, the fact still remains that Judge Harney had the opportunity to deny in no uncertain terms his authorship of the answer thereto, and failed to do so; and so long as the record stands here containing so many specific charges which are undenied, and notably the authorship of that answer, we decline to accept, as conclusive upon this court, the statement of the district judge that he determined the cause upon the law and the evidence, uninfluenced by any other consideration whatever.

In *Peck v. Pierce*, 63 Conn. 310, 28 Atl. 524, the judge trying the cause read certain entries of account which had not been offered in evidence, but which bore directly upon the point in controversy, and, notwithstanding he made the statement that he did not consider them in arriving at his decision, and that they did not influence him at all, the court set aside the decision, and said: "Now, there can be no sort of doubt that the trial judge intended to, and did, so far as it is possible for any one to do such a thing, dismiss these entries from his mind, and did not consider them in arriving at his decision, and that he was fully persuaded that he had succeeded in the attempt. This court, however, has, in cases like this, with a good degree of uniformity, refused to accept such statements as conclusive, on the ground that 'the operations of the human mind are so subtle, and the influences which affect it so difficult to be appreciated, that it is utterly improbable, not to say impossible,' for the party making them to know whether the evidence influenced

him or not; holding that all that such statements can mean is that the maker of them was unconscious of the influence."

Judge Harney's affidavit is, in effect, that in all proceedings pertaining to the case he was entirely uninfluenced by any one, that he determined the cause upon the law and the evidence, that he had no knowledge that any one was attempting to influence him in his action, and that during the time he was considering the case he was not disabled or incapacitated by the use of intoxicating liquors.

If Judge Harney did not write the answer to that so-called "dearie" letter, he could have said so in few words and in positive terms; if he did write it, that fact alone would come too near demonstrating that Mrs. Brackett had exerted an undue influence over him with respect to the cause, or at least cast too grave a suspicion upon the integrity of the proceedings to permit the result to stand.

A corrupt attempt to influence a verdict of a jury or decision of a court is always a ground for a new trial, without reference to the merits of the case, and whether successful or not. The law is so sensitive upon this subject that affidavits, not explained away, casting suspicion of such misconduct on the prevailing party, will avoid the judgment. (Thompson on Trials, Sec. 2560; *Huston v. Vail*, 51 Ind. 299.)

Litigants have a right to expect that no discussion of the cause will be had out of court with the judge or jury trying the same.

While the application of the rule here laid down may result in great injustice in isolated cases, the wholesomeness of the doctrine cannot be questioned. The judgment in this case will be set aside, not as a punishment for the defendants, but that no unlawful interference with the dignified and orderly course of judicial proceedings may be given countenance in the jurisprudence of this state.

No judgment of a court of justice so tainted with corruption as the record leaves this should stand, and its cancellation in this instance will be the evidence of the determination of this

court to pursue to the utmost its constitutional and lawful authority, to the end that public confidence in our judicial system may not be lessened, and that the fountain of justice may be kept pure.

The judgment and orders appealed from are reversed, and the cause is remanded with directions to the district court to grant a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY: A new trial is ordered in this case on the ground of irregularity on the part of defendants by which the plaintiff was prevented from having a fair trial. While I do not doubt that the views expressed by my brethren in the last paragraph of the foregoing opinion are just, and that the conclusion reached will go far toward maintaining public confidence in the administration of justice in this state, I nevertheless have grave doubts whether the facts bring the case within the purview of the statute. (Code of Civil Procedure, Sec. 1171.) Judges sustain a different relation to litigants from that occupied by jurors, and are to be judged by a different standard. This has always been the rule under those systems which recognize the distinctions between courts of law and equity; and while, under our system, this distinction has been abolished, and suits in equity are no longer tried *de novo* by the appellate court upon the evidence submitted to the trial court, under which method of procedure the elements of bias, prejudice and corruption in the trial judge are eliminated, it is a matter of great doubt whether the statute was intended to cover such a case as is presented by the record before us.

I shall not dissent, however, nor attempt a discussion of the principles involved. I content myself with this expression of doubt on this point.

I concur in the views expressed in the last paragraph of the opinion as to the conduct of the trial judge pending the hearing of this cause. I also concur in the conclusions reached in the other paragraphs of the opinion.

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EMERSON, APPELLANT, v. MCNAIR ET AL., RESPONDENTS.

(No. 1603.)

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(Submitted June 16, 1903. Decided July 24, 1903.)

*Appeal — Appellate Jurisdiction — Statutory Regulations —
Appeal from Order Setting Aside a Default Judgment—
Record—Certification of Papers.*

1. The constitution grants appellate jurisdiction to the supreme court, to be exercised under "such regulations and limitations as may be prescribed by law;" substantial compliance with the provisions of the statutes governing appeals is necessary to give the supreme court the right to exercise such jurisdiction.
2. Under Code of Civil Procedure, Section 1737, which provides that on appeal from an order, except an order granting or refusing a new trial, "the appellant must furnish the court with a copy of the notice of appeal, of the judgment or order appealed from, and of papers used on the hearing in the court below," on appeal from an order setting aside a default judgment, the judgment roll as such is not properly a part of the record.
3. Code of Civil Procedure, Section 1737, provides that on appeal from an order, except an order granting or refusing a new trial, the appellant must furnish a copy of the notice of appeal, of the judgment or order appealed from, and of papers used on the hearing. Section 1739 declares that "the copies provided in the last three sections must be certified as correct by the clerk or attorneys." *Held* that, on appeal from an order setting aside a default judgment, the only method by which the papers used by the court below on the hearing can be certified to the supreme court as the papers used on the hearing is by incorporating the same in the bill of exceptions.
4. Where the bill of exceptions recited that the records and files of the action were offered and used on the hearing, but neither the complaint, summons, motion for cost bond, nor the proposed answer was incorporated therein, these papers were not properly before the court.

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

ACTION by Katherine Emerson against B. P. McNair and others. From an order setting aside defendants' default, plaintiff appeals. Appeal dismissed.

Mr. George H. Stanton, for Appellant.

Messrs. Downing & Stephenson, and Mr. Ransom Cooper, for Respondents.

MR. COMMISSIONER CLAYBERG prepared the opinion for the court.

This is an appeal from an order setting aside a judgment taken against the defendants by default.

After a hearing of the appeal it appeared to the court, from an examination of the record, that certain important points involved in the case had not been noticed by counsel, either in their briefs or argument. The court thereupon submitted eight questions for reargument, among which was the following: "Are all of the records and papers necessary to the hearing of this appeal in the record, and, if so, are they brought up in the proper manner?" All the questions which were thus submitted were argued by counsel with zeal and ability, but, under our view of the case, none of such questions can be considered by this court, except the one above quoted.

The Constitution grants appellate jurisdiction to the supreme court, to be exercised under "such regulations and limitations as may be prescribed by law." (Constitution, Art. VIII, Secs. 2, 3 and 15.) In pursuance of this grant, and as furnishing methods for the exercise of the jurisdiction granted, the legislature has enacted statutes providing how appeals may be taken, determining of what the record on such appeal shall consist, and how such records shall be certified to this court. Substantial compliance with these provisions is necessary to give this court the right to exercise the jurisdiction granted. (*Featherman v. Granite County*, 28 Mont. 462, 72 Pac. 972.)

Therefore a brief reference to some of these statutory provisions, as to the contents of the record on appeal, and how it must be certified to this court, is important.

Section 1736, Code of Civil Procedure, provides that, on an appeal from a final judgment, "the appellant must furnish the court with a copy of the notice of appeal, of the judgment roll, and of any bill of exceptions or statement in the case, upon which the appellant relies."

Section 1738 provides that, on an appeal from an order granting or refusing a new trial, "the appellant must furnish the

court with a copy of the notice of appeal, of the order appealed from, and of the papers designated in Section 1176 of this Code."

Section 1176 provides: "The judgment roll, and the affidavits, or bill of exceptions or statement, as the case may be, used on the hearing, with a copy of the order made, shall constitute the record to be used on appeal from the order granting or refusing a new trial."

Section 1737 provides that, on appeal from an order except an order granting or refusing a new trial, "the appellant must furnish the court with a copy of the notice of appeal, of the judgment or order appealed from, and of papers used on the hearing in the court below."

This court has held that, upon an appeal which requires the judgment roll to be a part of the record, such judgment roll must be certified up as an entity, and that it is not sufficient that all or any part thereof be copied in a bill of exceptions or statement on motion for a new trial, although such bill of exceptions or statement is contained in the record on appeal. (*Featherman v. Granite County*, 28 Mont. 462, 72 Pac. 972.)

The case at bar is an appeal from an order other than one granting or refusing a new trial. The statute does not require the judgment roll as such to be made a part of the record on such appeal, and therefore it is not properly a part thereof. The statute provides that the record upon such an appeal shall consist of "a copy of the notice of appeal, the judgment or order appealed from, and of the *papers* used on the hearing in the court below."

Section 1739 provides that "the copies provided for in the last three sections must be certified to be correct by the clerk or the attorneys."

The statute does not seem to provide any specific method for certifying to this court the fact as to what papers were "used on the hearing in the court below." This court has, however, said, "The district court clerk had no authority, under Section 1739, to certify what evidence, documentary or oral, the court

had before it on the hearing of the motion" (*State ex rel. Pierson v. Millis*, 19 Mont. 444, 48 Pac. 773); and in the case of *Rumney Land & Cattle Co. v. Detroit & Montana Cattle Co.*, 19 Mont. 557, 49 Pac. 395, this court uses the following language: "Under the Code of Civil Procedure of 1895, on appeal from an order, the only proper mode of bringing up for consideration the evidence relied on, whether oral or written, used or before the court on the hearing of the motion for the order, is by a bill of exceptions; and unless such evidence has been included in, and made a part of, the record, by bill of exceptions taken in pursuance of, and prescribed in, said Code, it is not, and cannot be, considered as properly identified on appeal."

In *State ex rel. Pierson v. Millis*, *supra*, *Rumney Land & Cattle Co. v. Detroit & Montana Cattle Co.*, *supra*, and *Beach v. Spokane Ranch & Water Co.*, 25 Mont. 367, 65 Pac. 106, it was stated by the court, by way of argument merely, that the papers used by the court below might be identified by the certificate of counsel. This court, however, considered the correctness of these statements in the case of *Cornish v. Floyd-Jones*, 26 Mont. 154, 66 Pac. 838, and used the following language: "We take occasion now to say that we doubt whether that section (1739, Code Civ. Proc.) is susceptible of the construction assumed in these cases to be proper. We think the authority given by it extends no further than to permit counsel by their certificate to obviate the necessity of a certificate by the clerk as to the correctness of the copies contained in the transcript. As was held in the first two cases cited, the clerk may not certify the papers as those used, or the only ones used, on the hearing. Neither, in our opinion, may the attorneys do so. We shall therefore not feel bound by these cases when the point properly arises." The point arises directly in this case, and we apply the doctrine here announced.

We are therefore of the opinion that, on appeal from an order like the one at bar, the only method by which the papers used by the court below on the hearing may be certified to this

court as the papers used on the hearing is by incorporating the same in a bill of exceptions.

The bill of exceptions in this case recites that the records and files in the action were offered and used on the hearing, but neither the complaint, summons, motion for cost bond, nor the proposed answer is incorporated therein. These papers are therefore not properly before the court. Compliance by appellant with "such regulations and limitations as may be prescribed by law" being necessary to give this court jurisdiction of an appeal, without substantial compliance therewith jurisdiction does not attach. As well said by Judge Knowles, in the case of *Rader v. Nottingham*, 2 Mont. 157: "Holding, as we do, that we have no jurisdiction to determine the issue presented in this appeal, any judgment or order that we might render thereon would be void. Not desiring to cumber our records with a void judgment or order to vex the court below with, we must dismiss this appeal on our own motion." This language is quoted with approval in the case of *State ex rel. Pierson v. Millis*, *supra*.

In our opinion, inasmuch as the papers used upon the hearing in the court below are not properly certified to this court, the appeal must be dismissed, under the provision of Section 1740 of the Code of Civil Procedure.

PER CURIAM.—For the reasons stated in the foregoing opinion, the appeal is hereby dismissed.

It is the opinion of this court that it is important that the practice in perfecting appeals to this court be permanently settled in accordance with the provisions of the statute.

MEMORANDA

OF

DECISIONS RENDERED WITHOUT WRITTEN OPINIONS DURING THE PERIOD EMBRACED IN THIS VOLUME.

No.—1,527.—WETZSTEIN, APPELLANT, v. BOSTON & MONTANA CONSOL. C. & S. MINING CO., RESPONDENT.

Appeal from District Court, Silver Bow County; John Lindsay, Judge.

On motion to dismiss appeal.

Decided April 15, 1903.

PER CURIAM.—Upon motion of the appellant herein this appeal is dismissed at the cost of appellant.

Messrs. McHatton & Cotter, for Appellant.

Messrs. Forbis & Evans, for Respondent.

No. 1,936.—FARRIS, APPELLANT, v. WESTERN UNION TELEGRAPH CO., RESPONDENT.

Appeal from District Court, Silver Bow County.

On motion to dismiss appeal.

Decided April 22, 1903.

28	578
34	341
d34	342
28	578
35	74
28	578
37	31

EMERSON, APPELLANT, v. MCNAIR ET AL., RESPONDENTS.

(No. 1803.)

(Submitted June 16, 1903. Decided July 24, 1903.)

*Appeal — Appellate Jurisdiction — Statutory Regulations —
Appeal from Order Setting Aside a Default Judgment—
Record—Certification of Papers.*

1. The constitution grants appellate jurisdiction to the supreme court, to be exercised under "such regulations and limitations as may be prescribed by law;" substantial compliance with the provisions of the statutes governing appeals is necessary to give the supreme court the right to exercise such jurisdiction.
2. Under Code of Civil Procedure, Section 1737, which provides that on appeal from an order, except an order granting or refusing a new trial, "the appellant must furnish the court with a copy of the notice of appeal, of the judgment or order appealed from, and of papers used on the hearing in the court below," on appeal from an order setting aside a default judgment, the judgment roll as such is not properly a part of the record.
3. Code of Civil Procedure, Section 1737, provides that on appeal from an order, except an order granting or refusing a new trial, the appellant must furnish a copy of the notice of appeal, of the judgment or order appealed from, and of papers used on the hearing. Section 1739 declares that "the copies provided in the last three sections must be certified as correct by the clerk or attorneys." Held that, on appeal from an order setting aside a default judgment, the only method by which the papers used by the court below on the hearing can be certified to the supreme court as the papers used on the hearing is by incorporating the same in the bill of exceptions.
4. Where the bill of exceptions recited that the records and files of the action were offered and used on the hearing, but neither the complaint, summons, motion for cost bond, nor the proposed answer was incorporated therein, these papers were not properly before the court.

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

ACTION by Katherine Emerson against B. P. McNair and others. From an order setting aside defendants' default, plaintiff appeals. Appeal dismissed.

Mr. George H. Stanton, for Appellant.

Messrs. Downing & Stephenson, and Mr. Ransom Cooper, for Respondents.

MR. COMMISSIONER CLAYBERG prepared the opinion for the court.

This is an appeal from an order setting aside a judgment taken against the defendants by default.

After a hearing of the appeal it appeared to the court, from an examination of the record, that certain important points involved in the case had not been noticed by counsel, either in their briefs or argument. The court thereupon submitted eight questions for reargument, among which was the following: "Are all of the records and papers necessary to the hearing of this appeal in the record, and, if so, are they brought up in the proper manner?" All the questions which were thus submitted were argued by counsel with zeal and ability, but, under our view of the case, none of such questions can be considered by this court, except the one above quoted.

The Constitution grants appellate jurisdiction to the supreme court, to be exercised under "such regulations and limitations as may be prescribed by law." (Constitution, Art. VIII, Secs. 2, 3 and 15.) In pursuance of this grant, and as furnishing methods for the exercise of the jurisdiction granted, the legislature has enacted statutes providing how appeals may be taken, determining of what the record on such appeal shall consist, and how such records shall be certified to this court. Substantial compliance with these provisions is necessary to give this court the right to exercise the jurisdiction granted. (*Featherman v. Granite County*, 28 Mont. 462, 72 Pac. 972.)

Therefore a brief reference to some of these statutory provisions, as to the contents of the record on appeal, and how it must be certified to this court, is important.

Section 1736, Code of Civil Procedure, provides that, on an appeal from a final judgment, "the appellant must furnish the court with a copy of the notice of appeal, of the judgment roll, and of any bill of exceptions or statement in the case, upon which the appellant relies."

Section 1738 provides that, on an appeal from an order granting or refusing a new trial, "the appellant must furnish the

No. 1,581.—EVKOVICH, RESPONDENT, v. BARNES, APPELLANT.

Appeal from District Court, Granite County; Welling Napton, Judge.

On motion to dismiss appeal.

Decided May 16, 1903.

PER CURIAM.—Upon motion of counsel for the respondent this appeal is dismissed without prejudice to a motion to reinstate.

June 6, 1903.

PER CURIAM.—The motion to reinstate the appeal herein, heretofore submitted to and by the the court taken under advisement, is denied.

Mr. W. E. Moore, for Appellant.

Messrs. Durfee & Brown, and *Mr. George A. Maywood*, for Respondent.

No. 1,763.—MILLIGAN, APPELLANT, v. FREDERICKS ET AL., RESPONDENTS.

Appeal from District Court, Broadwater County; E. K. Cheadle, Judge.

Decided June 2, 1903.

PER CURIAM.—The appeal herein is dismissed as settled, in accordance with the stipulation on file.

Mr. George F. Cowan, for Appellant.

Mr. E. B. Hoffman, for Respondents.

No. 1,958.—STATE EX REL. MELVILLE, RELATOR, *v.* DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT ET AL., RESPONDENTS.

Original—*Certiorari*.

Decided June 13, 1903.

PER CURIAM.—Relator's application for a writ of review herein is denied.

Rehearing denied June 17, 1903.

Mr. Charles O'Donnell, for Relator.

No. 1,626.—STATE PUBLISHING CO., APPELLANT, *v.* NEIL, RESPONDENT.

Appeal from District Court, Lewis and Clarke County; H. C. Smith, Judge.

On motion to dismiss appeal.

Decided June 18, 1903.

PER CURIAM.—Upon motion of counsel for the appellant herein, this appeal is dismissed; each party to pay his or its own costs.

Mr. H. J. Burleigh, and *Mr. C. B. Nolan*, for Appellant.

Messrs. Carpenter & Carpenter, for Respondent.

No. 1,608.—IN RE KELLY'S ESTATE.

Appeal from District Court, Silver Bow County; John Lindsay, Judge.

Decided June 18, 1903.

PER CURIAM.—This cause having been set for hearing this day, and no briefs having been filed, it is ordered that the appeal herein be and the same is hereby dismissed.

Mr. L. P. Forrestell, for Appellant.

No. 1,630.—STATE EX REL. BOSTON & MONTANA CONSOL. C. & S. MINING CO., RELATOR, v. DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT AND WILLIAM CLANCY, JUDGE THEREOF, RESPONDENTS.

Original—*Certiorari.*

Decided June 19, 1903.

PER CURIAM.—Upon motion of counsel for the relator this application for a writ of review is dismissed without costs, in accordance with the stipulation on file.

Messrs. Forbis & Evans, for Relator.

Mr. J. M. Denny, and Messrs. Cullen, Day & Cullen, for Respondents.

No. 1,920.—RUMNEY ET AL., RESPONDENTS, *v.* DONOVAN,
APPELLANT.

*Appeal from District Court, Lewis and Clarke County; J.
M. Clements, Judge.*

On motion to dismiss appeal.

Decided June 19, 1903.

PER CURIAM.—Upon motion of counsel for the appellant this
appeal is hereby dismissed as settled.

Mr. F. W. Mettler, for Appellant.

Messrs. Clayberg & Gunn, and *Mr. A. J. Galen*, for Respond-
ents.

No. 1,937.—IN RE LOGAN.

*Appeal from District Court, Flathead County; D. F. Smith,
Judge.*

On motion to dismiss appeal.

Decided June 19, 1903.

PER CURIAM.—Upon motion of counsel for the appellant
herein, this appeal is dismissed as settled.

Mr. James Donovan, for Appellant.

No. 1,962.—STATE EX REL. ANACONDA COPPER MINING CO. ET AL., RELATORS, *v.* DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT, AND WILLIAM CLANCY, JUDGE THEREOF, RESPONDENTS.

Nos. 1,964 AND 1,965.—STATE EX REL. BOSTON & MONTANA CONSOL. COPPER & SILVER MINING CO., RELATOR, *v.* DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT, AND WILLIAM CLANCY, JUDGE THEREOF, RESPONDENTS.

Original—Writs of supervisory control.

On motion to dismiss.

Decided June 29, 1903.

PER CURIAM.—The motions to dismiss the applications herein are sustained, and the proceedings are accordingly dismissed.

MR. CHIEF JUSTICE BRANTLY: In causes numbered 1,962, 1,964 and 1,965, being applications to this court for writs of supervisory control to prohibit the court of the Second judicial district, with Judge Clancy presiding, from proceeding with the hearing of three certain causes set for trial in that court, in which the Boston & Montana Company, the Anaconda Copper Mining Company and the Washoe Company are parties, the causes involved having been submitted to the court under motions to dismiss on the ground that this court has no jurisdiction, after as careful an examination as we have been able to give to the legal questions involved during the brief time we have had at our disposal, the court has reached the conclusion that it cannot interfere.

I wish to say, speaking for myself, that my view of this matter is this: The people of the state organized their government; the scheme of that government is contained in the Constitution of the state and statutes enacted in pursuance there-

of. It is not the province of the court to mend or remedy the imperfections, if any exist. There are certain trusts which have been reposed finally in the honesty and integrity of certain individuals who hold official positions under the government. Among these are disputed questions of fact and other matters of that kind, lodged in the discretion of the district judges. The legislature has deemed it wise to be silent upon the subject of bias and prejudice in district courts, thereby leaving it to the honesty and integrity of the individual judge to perform his duty under his oath in that regard. If that is an imperfection, then this court has no power to remedy it. The Constitution impliedly leaves to the legislature the power to determine what shall be disqualifications of judges, when change of venue shall be had, and matters of that kind. It is silent on the subject of how there shall be a change of judges under certain circumstances, and this court has no power to legislate by declaring what should be embodied in the organic law or in the statutes and act upon that legislation.

I do not assent to the proposition that a man, even the humblest citizen in this state, has not the legal right to a fair and impartial trial. Every citizen has that right, but no remedy is provided for cases in which that right is not accorded by district courts, except by impeachment of the judge who refuses it, or by discipline at the polls, or through the medium of disbarment proceedings.

MR. JUSTICE MILBURN: I join in the order denying the relators' petitions, for the reason that I am not convinced that under the facts alleged in the petitions the writ of supervisory control is the right remedy, if there be any, and not being satisfied, I therefore join in the order. I do not wish to be understood, however, as saying that in the state of Montana the law is as claimed by the respondents, that is—that a judge can lawfully sit on the bench in a criminal case and try John Doe or Richard Roe for murder of the judge's wife, or for highway robbery committed upon him, the judge,—that is the position taken by

the respondents in this case. I do not believe that such is the law. I am not convinced by the relators that writs of supervisory control should be issued in the cases now before us. I believe they have a remedy; I believe there is a remedy under the Code; in this my brethren do not agree with me.

Rehearing denied July 9, 1903.

Mr. W. W. Dixon, Mr. A. J. Shores, Mr. C. F. Kelley, Mr. D. Gay Stivers, and Messrs. Forbis & Evans, for Relators.

Messrs. McHatton & Cotter, for Respondents.

NO. 1,686.—STATE EX REL. BROGAN, RELATRIX, v. DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT, AND E. W. HARNEY, JUDGE THEREOF, RESPONDENTS.

Original—*Mandamus*.

Decided July 3, 1903.

PER CURIAM.—This cause is dismissed in accordance with the stipulation on file.

Mr. L. P. Forrestell, for Relatrix.

Messrs. McHatton & Cotter, for Respondents.

No. 1,931.—COTTER, RESPONDENT, v. BUTTE & RUBY VALLEY SMELTING CO., APPELLANT.

Appeal from District Court, Silver Bow County; William Clancy, Judge.

On motion to dismiss appeal.

Decided July 13, 1903.

PER CURIAM.—The motion to dismiss this appeal is sustained and the appeal is accordingly dismissed.

Mr. James E. Murray, and Mr. Robert McBride, for Appellant.

Messrs. McHatton & Cotter, for Respondent.

Rehearing granted November 20, 1903.

No. 1,642.—BALLARD ET AL., RESPONDENTS, v. PATTEN ET AL., APPELLANTS.

Appeal from District Court, Granite County; Welling Napton, Judge.

On motion to dismiss appeal.

Decided July 14, 1903.

PER CURIAM.—The motion to dismiss the appeal herein is sustained and the appeal is accordingly dismissed.

Messrs. McConnell & McConnell, and Mr. W. E. Moore, for Appellants.

Mr. D. M. Durfee, for Respondents.

No. 1,633.—WOODWARD ET AL., RESPONDENTS, v. COURTNEY ET AL., APPELLANTS.

Appeal from District Court, Gallatin County; F. K. Armstrong, Judge.

On motion to dismiss appeal.

Decided July 14, 1903.

PER CURIAM.—The motion to dismiss the appeal herein is sustained, and the appeal is accordingly dismissed.

(MR. JUSTICE HOLLOWAY, being disqualified, takes no part in this order.)

Rehearing denied October 9, 1903.

Messrs. Sanders & Sanders, for Appellants.

Messrs. Hartman & Hartman, for Respondents.

No. 1,634.—RIDDELL, RESPONDENT, v. PECK-WILLIAMSON HEATING AND VENTILATING CO., APPELLANT.

Appeal from District Court, Silver Bow County; John Lindsay, Judge.

Decided July 14, 1903.

PER CURIAM.—This appeal is dismissed at the cost of appellant, in accordance with the stipulation on file.

Messrs. Pemberton & Maury, for Appellant.

Messrs. McHatton & Cotter, for Respondent.

No. 1,881.—WILSON, RECEIVER, RESPONDENT, *v.* HERSHFIELD ET AL., DEFENDANTS; MARY HERSHFIELD, APPELLANT.

Appeal from District Court, Lewis and Clarke County; Henry C. Smith, Judge.

Decided July 21, 1903.

PER CURIAM.—This appeal is dismissed, and *remittitur* ordered to issue forthwith in accordance with the precept of counsel for appellant of date of July 20, 1903, at 2:30 p. m.

Messrs. Sanders & Sanders, for Appellant.



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ACCOUNTING.

Action for an Accounting—Complaint.

In the absence of an allegation of demand and refusal, a complaint does not state facts sufficient to constitute a cause of action for an accounting.—*Wetzstein v. Boston & Montana C. C. & S. Mining Co.*, 451.

ACTIONS.

Parties—Substitution—Claim and Delivery.

1. In an action in claim and delivery, the court, under Code of Civil Procedure, Section 588, cannot make an order substituting in place of the defendant a claimant of the property, on the application of the defendant who has no control over the property (because of its previous delivery to the sheriff), and no power to deliver it on the court's order.—*State ex rel. Weinstein Co. v. District Court*, 445.

Another Action Pending.

2. Where a complaint shows that a former action, between the same parties and for the same cause, is before the supreme court undetermined on appeal, a demurrer is properly sustained thereto.—*Wetzstein v. Boston & Montana C. C. & S. Mining Co.*, 451.

Identity of Parties.

3. The action is between the same parties when it appears from the complaint that the defendant in the action is the successor in interest of the defendant in a former action.—*Wetzstein v. Boston & Montana C. C. & S. Mining Co.*, 451.

Same Cause of Action.

4. The action is for the same cause, if based on the same assertion of title as in a former action, though the plaintiff in the subsequent action prays for an injunction, the appointment of a receiver, and for an accounting, where he was entitled to such relief as to the injunction and receiver in the former action, and fails to state facts sufficient to constitute a cause of action for an accounting, by not averring a demand for an accounting and a denial thereof by defendant.—*Wetzstein v. Boston & Montana C. C. & S. Mining Co.*, 451.

AMENDMENTS.

See TRIAL, 5.

APPEAL.

See RULES OF SUPREME COURT.

Irregularity or Abuse of Discretion—Review on Appeal.

1. Code of Civil Procedure, Section 1171, Subdivision 1, authorizes a new trial for any irregularity or abuse of discretion preventing a fair trial. Section 1172 requires that when application is made for such a cause it must be upon affidavits. *Held*, that the failure to show by affidavit an alleged error of the court in commenting on the probable effect of evidence at the time of its reception precludes its review on appeal.—*Coleman v. Perry*, 1.

Injunction *Pendente Lite*—Appeal—Review.

2. Upon an appeal from an order refusing an injunction *pendente lite*, the principal question for consideration is whether, upon the evidence introduced at the hearing, the court below manifestly abused its discretion in refusing the injunction.—*Colusa Parrot M. & S. Co. v. Barnard*, 11.

Injunction *Pendente Lite*—Admission of Incompetent Evidence—Presumption.

3. An admission of incompetent evidence on the hearing of a motion for an injunction *pendente lite* is not ground for reversal in view of the presumption that the court acted only on the competent evidence adduced.—*Colusa Parrot M. & S. Co. v. Barnard*, 11.

Reversal of Order for New Trial—Stipulation.

4. Where, after an appeal from an order granting a new trial, the parties, in pursuance of a settlement which they have reached, file a stipulation requesting a reversal of the order, that disposition of the case will be made (when there is no question as to the district court's jurisdiction in the case), though it is not apparent that, upon an examination of the record, affirmance might not be proper.—*Mantle v. Largey*, 38.

Opinion of Trial Court.

5. On appeal the opinion of the lower court has no place in the record and cannot be looked to for any purpose, and a contention that it shows that the court did not consider certain evidence which was admitted without objection cannot be entertained.—*Phillips v. Coburn*, 45.

Findings—Insufficiency of Evidence—Specifications.

6. Where the specifications of particulars wherein the evidence is alleged to be insufficient to support the findings do not meet the requirements of Section 1173, Code of Civil Procedure, they will be disregarded.—*Phillips v. Coburn*, 45.

Findings—Conflicting Evidence.

7. Where the evidence is conflicting, findings of fact of the district court are conclusive on appeal.—*Phillips v. Coburn*, 45.

Irregularity or Abuse of Discretion—Review on Appeal.

8. Under Code of Civil Procedure, Section 1172, providing that when an application for a new trial is made for irregularity in the proceedings of the court, or for an abuse of discretion, it must be made on affidavits, an alleged error, consisting in the use of certain language by the court in the

presence of the jury during the trial, cannot be reviewed, where the error is not preserved and brought into the record by affidavit.—*Tague v. John Caplice Co.*, 51.

Exclusion of Evidence—Review.

9. The exclusion of evidence cannot be reviewed where no offer to prove the facts sought to be elicited by the excluded interrogatory was made.—*Tague v. John Caplice Co.*, 51.

Exclusion of Evidence—Review.

10. Where evidence excluded by the trial court is not in the record, the alleged error of the court in excluding it cannot be reviewed.—*Tague v. John Caplice Co.*, 51.

Conclusion of Law Contradictory of Agreed Statement of Facts.

11. Under Code of Civil Procedure, Section 1117, which provides that an agreed statement of facts has the effect of special findings, a conclusion of law contradictory of the agreed statement is sufficient to vitiate the judgment.—*Birney v. Warren*, 64.

Order Appointing Receiver.

12. Under the express provisions of Session Laws of 1899, p. 146, an *ex parte* order appointing a receiver is appealable.—*Rumney v. Donovan*, 69.

Record on Appeal—Notice of Intention to Move for New Trial.

13. The notice of intention to move for a new trial is not a necessary part of the record on appeal from an order denying a new trial unless some objection is presented to the notice in the trial court which the party making desires to have the supreme court pass upon.—*King v. Pony Gold Mining Co.*, 74.

Insufficiency of Evidence—Record—Review.

14. Sufficiency of the evidence to support the decree cannot be considered where it does not appear from the certificate of the trial judge settling the statement, or from the statement or bill of exceptions, that the record contains all the evidence or its substance.—*King v. Pony Gold Mining Co.*, 74.

Insufficiency of Evidence—Record—Review.

15. Where the statement on motion for a new trial stated that plaintiff called certain witnesses, who testified as therein set forth and "plaintiff rested," and that defendant called certain witnesses, whose testimony was also given, "whereupon defendants rested," it was not made to appear that all the evidence given was contained in the record.—*King v. Pony Gold Mining Co.*, 74.

Insufficiency of General Denial.

16. Alleged insufficiency of a general denial cannot be first raised on appeal.—*King v. Pony Gold Mining Co.*, 74.

Suit in Equity—Instructions—Review.

17. On appeal in a suit in equity, alleged error in instructions cannot be considered; the verdict being merely advisory.—*King v. Pony Gold Mining Co.*, 74.

Order Refusing to Grant a Nonsuit—Appeal—Waiver.

18. Where, in appellant's original brief and in the oral argument, no reference was made to error in refusing to grant a motion for a nonsuit, an assignment based on such refusal will be considered waived.—*King v. Pony Gold Mining Co.*, 74.

Suit in Equity—Admission of Incompetent Evidence.

19. Admission of incompetent evidence in an equity case is not reversible error, it being presumed that the court considered competent evidence only, except where it clearly appears from the record that the court actually considered the incompetent evidence in making up its findings, or where the record—containing all the evidence—does not disclose sufficient competent evidence to warrant the findings.—*King v. Pony Gold Mining Co.*, 74.

Insufficiency of Evidence—Record—Review.

20. Where the record does not purport to contain all the evidence, it will be presumed that there was sufficient competent evidence to support the decree.—*King v. Pony Gold Mining Co.*, 74.

Exclusion of Evidence—Review.

21. In a suit against stockholders of a corporation, defendants could not allege error in the admission in evidence of the report of a stockholders' meeting, when by subsequent amendment of their pleadings they admitted the existence of the evidence objected to.—*King v. Pony Gold Mining Co.*, 74.

Exclusion of Evidence—Review.

22. Assignments of error in sustaining objections to certain questions cannot be considered where there is no showing as to what the answers would have been, and the questions give no indication of the specific evidence sought to be adduced.—*King v. Pony Gold Mining Co.*, 74.

Insufficiency of Evidence—Specification of Particulars—Review.

23. Under Code of Civil Procedure, Section 1152, providing that, when an exception to a verdict or decision is on account of the insufficiency of the evidence, the objection must specify the particulars in which the evidence is alleged to be insufficient, a bill of exceptions containing no specifications whatever, nor pointing out in any manner any insufficiency, will not warrant a review of the evidence.—*Robertson v. Longley*, 128.

Insufficiency of Evidence—Incomplete Record—Review.

24. Where it is not apparent from any recital in the record that it contains all the evidence, or the substance thereof, and there is no statement in the certificate of the judge from which it may be inferred that the bill contains all the evidence in substance, its sufficiency cannot be reviewed.—*Robertson v. Longley*, 128.

Appeal from Judgment—Dismissal.

25. Under Code of Civil Procedure, Sections 1722, 1736, providing that an appeal may be taken from a final judgment entered in an action, and that appellant must furnish the court with a copy of the judgment roll, where the record does not show that any judgment has been entered in the case in the court below, an appeal from the judgment will be dismissed.—*Lisker v. O'Rourke*, 120.

Appeal from an Order Denying a New Trial—Record.

26. Under Code of Civil Procedure, Sections 1738, 1176, upon appeal from an order denying a new trial the record must contain a copy of the judgment roll.—*Lisker v. O'Rourke*, 129.

Appeal from Order Denying a New Trial—Record—Omission of Judgment—Rehearing.

27. Though an appeal from an order denying a new trial should have been dismissed because of the failure of the record to contain a copy of the judgment entered as required by Code of Civil Procedure, Sections 1176, 1738, the court, on a rehearing on an appeal from a judgment which is dismissed, and from an order denying a new trial, which is affirmed, will not reopen the case to correct this technical error of practice.—*Lisker v. O'Rourke*, 129.

Appeal from Order Denying a Continuance—Record.

28. Where there was nothing in the record to show that any motion for a continuance was made, heard or determined by the court, or that the court ever made an order continuing or refusing to continue the cause, an assignment that the court erred in overruling defendant's motion for a continuance could not be reviewed.—*Miller v. Matheson*, 132.

Finding—Correction by Trial Court—Assignment of Error.

29. An assignment that the court erred in a finding will not be considered on appeal, where the court amended its finding, and there was no assignment that the amended finding was erroneous.—*Merrill v. Miller*, 134.

Instructions—Record—Review.

30. Where on appeal, it appears that there was sufficient competent testimony to sustain the verdict, under proper instructions, and the record does not contain the instructions, it will be presumed that the court properly instructed the jury.—*Reynolds v. Fitzpatrick et al.*, 170.

Estoppel.

31. A party is estopped from claiming that he is not bound by a decision procured by his own appeal and solicitation.—*Reynolds v. Fitzpatrick et al.*, 170.

Mechanic's Lien—Proof—Review.

32. Where, in a suit to enforce a mechanic's lien, no proof is made showing the existence of any lien, questions raised on appeal as to the extent or validity of the lien are not open to consideration.—*McGlauffin v. Wormser*, 177.

Appealable Order.

33. An order, made after judgment, refusing to sign a bill of exceptions, cannot be considered on appeal from the judgment and from an order denying a new trial.—*McGlauffin v. Wormser*, 177.

Appeal—Implied Finding—Record on Appeal—Preservation of Evidence—Review.

34. In an action tried to the court, defendants denied all the allegations of the complaint and specially pleaded the statute of limitations. On ap-

peal by plaintiff from the judgment, the only assigned error was that "the court erred in giving judgment against appellant, for in so doing he evidently held the statute of limitations had run against the action." *Held*, that as there was nothing in the record disclosing the reason why the court found and entered judgment in favor of defendants, it would be presumed—under the doctrine of implied findings—that the court found that the plaintiff failed to make out a *prima facie* case on the merits, hence, the evidence not being in the record, the judgment must be affirmed.—*Boe v. Hawes et al.*, 201.

Review—Exceptions.

35. The supreme court cannot review the action of the court below in disregarding one of the special findings of the jury, where the party complaining does not specifically except thereto, but relies entirely upon an exception to the entry of judgment in favor of the other party.—*Baker v. Butte City Water Co.*, 222.

Verdict—Special Findings—Inconsistency.

36. A motion for judgment on the special findings is necessary; otherwise judgment will be entered on the general verdict as of course. In the absence of such motion in the trial court, no question concerning the right to such judgment can be raised on appeal.—*Baker v. Butte City Water Co.*, 222.

Appealable Orders.

37. Pending an action to settle a controversy as to the ownership of a mining claim, a receiver was appointed. On appeal the order of appointment was reversed. Thereafter, on January 17th, a hearing was had on the final report of the receiver, and at the conclusion thereof the court made an order fixing his compensation at a certain sum, and allowing him certain further sums for counsel and stenographer's fees. The order contained no provision as to who should be charged with these allowances. Two days later the receiver moved for an order requiring the plaintiff in the action to pay the allowances, and on January 31st the motion was granted, and an order entered in the form of a final judgment against the plaintiff for the amount thereof. *Held*, that the order of January 31st, and not that of January 17th, was the appealable order.—*State ex rel. Heinze v. District Court*, 227.

Appealable Orders.

38. An application for the appointment of a receiver to work a mining claim pending a suit to settle a controversy as to the title thereto is not a "special proceeding," within the meaning of the Code of Civil Procedure. Section 1722, which, as amended by Acts 1899, page 146, provides that an appeal may be taken from a final judgment in an action or special proceeding within one year after the entry of judgment, but is a provisional remedy, which may only be had in an action, and cannot be made except as ancillary to and a step in the action itself.—*State ex rel. Heinze v. District Court*, 227.

Appealable Orders—Time for Appeal.

39. Code of Civil Procedure, Section 1723, as amended by the Act of 1899, provides that an appeal may be taken from a final judgment in an action or special proceeding within one year after the entry of judgment; from an order appointing or refusing to appoint a receiver, or giving directions with respect to a receivership, or refusing to vacate an order appointing

or affecting a receiver, within sixty days after entry thereof. Pending an action to settle a controversy as to the ownership of a mining claim, a receiver was appointed to work the property. On appeal the order of appointment was reversed. Afterwards an order was entered in the nature of a final judgment against the plaintiff in the action for the amount allowed the receiver for compensation, counsel fees, etc. Held to be a "final order in an action," and appealable within one year, and not an order "with respect to a receivership," appealable only for sixty days.—*State ex rel. Heinze v. District Court*, 227.

Bill of Exceptions—Refusal to Settle.

40. It is improper for the court to refuse to settle a bill of exceptions tendered in due time, for, while the appeal will lie whether the bill is made a part of the record or not, the papers and other evidence used on the hearing and the rulings on the objections cannot be of avail unless incorporated in a bill.—*State ex rel. Heinze v. District Court*, 227.

Setting Aside Default Judgment—Discretion—Review.

41. Since under Code of Civil Procedure, Section 774, applications to set aside default judgments are addressed to the discretion of the trial court, its action thereon will not be interfered with unless a manifest abuse of discretion is shown.—*Hegass v. Hegass*, 266.

Transcript—Judgment Roll.

42. Under Code of Civil Procedure, Section 1736, providing that on an appeal from a final judgment the appellant must furnish the court with a copy of the judgment roll, the court, on appeal from a final judgment, acquires no jurisdiction where the transcript contains no copy of any summons, proof of service, complaint, or other pleadings, constituting a part of the judgment roll, within Section 1196.—*Stanton v. Lewis*, 267.

Claim and Delivery—Judgment—Reversal.

43. Where, in an action in claim and delivery, the judgment contains a description of the property different from that found in either the complaint or the verdict, the judgment will, on appeal, be reversed.—*Conley v. Dunn*, 295.

Conflicting Evidence—Review.

44. Where the evidence is conflicting, the verdict, or finding, will not be disturbed.—*Nelson v. Great Northern Ry. Co.*, 297.

Order Allowing Defendant Costs—Appeal.

45. An order, after final judgment for defendant, refusing to disallow his costs, is reviewable on appeal from the judgment, and not on an independent appeal; the costs being a part of the judgment.—*Spencer et al. v. Mun-gus et al.*, 357.

Findings of Fact—Conflicting Evidence—Review.

46. Findings of fact by a trial court, based on conflicting evidence, will not be disturbed on appeal.—*Stevens et al. v. Curran et al.*, 366.

Witness—Privilege—Ruling of Court—Review.

47. Alleged error in failing to require a witness to answer a question, which he refused to answer on the ground that it involved a privileged

communication from a client, was not cause for reversal, where the evidence sought to be elicited was inadmissible, though no objection was made at the time.—*Bullard v. Smith*, 387.

New Trial—Statement—Settlement.

48. Under Code of Civil Procedure, Section 1173, providing that, if the amendments to the statement on motion for a new trial prepared by the adverse party are not adopted, the proposed statement and amendments shall, within ten days thereafter, be presented by the moving party to the judge, or delivered to the clerk for the judge, the court must disregard, on appeal, the statement and all questions sought to be presented thereby, when the moving party has failed to comply with such requirement.—*Wright v. Mathews*, 442.

Order Overruling Motion for New Trial—Appeal.

49. Where the court's order overruling a motion for a new trial does not indicate the particular ground on which it was made, every legitimate indictment will be indulged to support it.—*Wright v. Mathews*, 442.

Final Judgment.

50. Under Session Laws 1899, p. 135, amending Code of Civil Procedure, Section 1722, and providing for an appeal from a final judgment, an order substituting a claimant of property, on application of defendant in a claim and delivery action, in lieu of defendant, is not a final determination from which an appeal is allowable.—*State ex rel. Weinstein Co. v. District Court*, 445.

Appealable Orders.

51. Under Code of Civil Procedure, Section 1742, providing that on appeal from a judgment the court may review any intermediate order or decision excepted to which involves the merits or necessarily affects the judgment, an intermediate order substituting a claimant of property for defendant in a claim and delivery action may be reviewed on appeal from the final judgment, on exception reserved, and hence *certiorari* will not lie to have the order annulled as in excess of jurisdiction.—*State ex rel. Weinstein v. District Court*, 445.

New Trial Order—Record on Appeal.

52. Under Code of Civil Procedure, Section 1738, declaring that, on an appeal from an order granting a new trial, the appellant must furnish the court with a copy of a notice of appeal, of the order appealed from, and of the papers designated in Section 1176, etc., the court can only consider "copies" of the papers referred to; and hence a record on appeal, composed of original papers withdrawn from the files of the district court, will not support an appeal.—*Cornell v. Matthews*, 457.

Supreme Court—Appeal—Jurisdiction.

53. The supreme court has no jurisdiction of an appeal unless the record on appeal conforms to the requirements of the statute.—*Featherman v. Granite County*, 462; *Cornell v. Matthews*, 457.

Record on Appeal—Jurisdiction of Appeal.

54. A record on appeal, consisting only of a bill of exceptions, notice of appeal, and certificate of the clerk, and which does not purport to contain a certified copy of the judgment roll as such, part of the papers constituting

which are contained in the bill of exceptions, the existence of others merely being recited therein, is insufficient to give the court jurisdiction.—*Beck v. Holland*, 460.

Appeals—Record on Appeal—Jurisdiction.

55. Under Code of Civil Procedure, Section 1736, providing that on appeal from a final judgment, appellant must furnish the court with a copy of the notice of appeal, judgment roll, and bill of exceptions, or statement in the case, the presence of a copy of the judgment roll in the record is jurisdictional, and without it the court cannot consider any question on the appeal.—*Featherman v. Granite County*, 462.

Record on Appeal—Judgment Roll—Certificate.

56. Under Code of Civil Procedure, Section 1739, providing that the copies of papers to be furnished on appeal must be certified to be correct by the clerk or attorneys, on appeal from a final judgment it must be certified that the record contains a true copy of the judgment roll. A certificate which only states that the transcript contains true copies of certain designated papers contained in the judgment roll is insufficient.—*Featherman v. Granite County*, 462.

Record on Appeal—Judgment Roll—Bill of Exceptions.

57. The requirement of Code of Civil Procedure, Section 1736, providing that, on appeal from a final judgment, appellant must furnish the court with a copy of the notice of appeal, judgment roll, and bill of exceptions, or statement in the case, are not complied with by simply inserting in the record a copy of the bill of exceptions, or statement, even though it includes copies of all papers constituting the judgment roll.—*Featherman v. Granite County*, 462.

Fictitious Appeal—Dismissal.

58. Where, after the service of an order, made in a suit, restraining defendants from awarding any contracts under a legislative Act, defendants awarded contracts in a manner satisfactory to plaintiff in the suit, the appeal by defendants from the order will be dismissed.—*Snell v. Welch*, 482.

Erroneous Instruction—Prejudice—Presumption.

59. Error being apparent, prejudice will be presumed.—*Lawrence v. Westlake*, 503.

Record on Appeal—Insufficiency—Dismissal.

60. On appeal by plaintiff from a judgment for intervener, where neither the order striking out plaintiff's answer to the complaint in intervention, nor the one refusing him leave to file an answer, nor the one granting intervener's motion for judgment on the pleading, was in the record, alleged errors therein could not be reviewed.—*Doty v. McClusky*, 507.

Judgment by Consent—Appeal.

61. One cannot complain on appeal of a judgment entered by his consent.—*Corby v. Abbott*, 523.

Decree Canceling Tax Deed—Correction.

62. Judgment in favor of plaintiff canceling a tax deed, but failing to require payment to defendant of the amount admitted by plaintiff in his

complaint to be due defendant, and so found by the district court, will on appeal be remanded to the court with directions to amend its decree conformably to the conclusions found by it.—*Foster et al. v. Bender et al.*, 526.

Findings—Evidence—Presumption.

63. Where, in an action tried to the court, the evidence admitted without objection was sufficient to sustain the court's findings, it will be presumed on appeal that evidence erroneously admitted was not considered by the court in arriving at its conclusions.—*Finlen v. Heinze et al.*, 548.

Exclusion of Evidence—Appeal—Review.

64. Error in exclusion of pleadings in another action, offered in evidence, cannot be reviewed, where they are not included in the statement on the motion for a new trial.—*Finlen v. Heinze et al.*, 548.

Briefs—Costs.

65. Where appellant filed a brief containing 283 pages, much of which was repetition, and consisted of long arguments, extended excerpts from reported cases, and irrelevant matter, the cost of printing such brief would not be allowed on reversal of the judgment.—*Finlen v. Heinze et al.*, 548.

Appeal—Misconduct of Judge—New Trial.

66. Affidavits, not explained away, casting grave suspicion upon the integrity of a court's decision, is ground for a new trial, without reference to the merits of the case.—*Finlen v. Heinze et al.*, 548.

Appeal from Order Setting Aside Default Judgment—Record.

67. Under Code of Civil Procedure, Section 1737, which provides that on appeal from an order, except an order granting or refusing a new trial, "the appellant must furnish the court with a copy of the notice of appeal, of the judgment or order appealed from, and of papers used on the hearing in the court below," on appeal from an order setting aside a default judgment, the judgment roll as such is not properly a part of the record.—*Emerson v. McNair et al.*, 578.

Appeal from Order Setting Aside a Default Judgment—Record—Certification of Papers.

68. Code of Civil Procedure, Section 1737, provides that on appeal from an order, except an order granting or refusing a new trial, the appellant must furnish a copy of the notice of appeal, of the judgment or order appealed from, and of papers used on the hearing. Section 1739 declares that "the copies provided in the last three sections must be certified as correct by the clerk or attorneys." Held that, on appeal from an order setting aside a default judgment, the only method by which the papers used by the court below on the hearing can be certified to the supreme court as the papers used on the hearing is by incorporating the same in the bill of exceptions.—*Emerson v. McNair et al.*, 578.

Record on Appeal.

69. Where the bill of exceptions recited that the records and files of the action were offered and used on the hearing, but neither the complaint, summons, motion for cost bond, nor the proposed answer was incorporated therein, these papers were not properly before the court.—*Emerson v. McNair et al.*, 578.

ASSUMPSIT.

Quantum Meruit—Special Contract—Pleading.

1. Plaintiffs sued defendant on a *quantum meruit* for services rendered in delivering certain ties. Defendant denied liability on the ground that the ties were delivered under a contract in writing with which it was alleged plaintiffs had not complied, and plaintiffs by replication admitted that there was a contract in writing, but denied that it contained the entire agreement or that defendant had performed its obligations, and alleged a separate agreement by which plaintiffs were to receive extra pay for hauling ties a greater distance than that provided for in the contract. *Held*, that the allegations of the replication were a mere explanation of plaintiffs' denial of the answer, and not a statement of a new cause of action entitling defendant to judgment on the pleadings.—*Cook & Woldson v. Gallatin Railroad Co.*, 509.

Quantum Meruit—Special Contract—Right to Sue.

2. Where plaintiffs contracted in writing to haul and distribute along defendant's railroad 40,000 ties, for which plaintiffs were to be paid on the 15th of each month, and defendant failed to make payment for hauling as required, plaintiffs were entitled to refuse to make further deliveries, and sue at once on a *quantum meruit* for ties delivered.—*Cook & Woldson v. Gallatin Railroad Co.*, 509.

Quantum Meruit—Special Contract—Evidence.

3. Where, in a suit on a *quantum meruit* for hauling ties, defendant claimed that the ties were delivered under an express contract which plaintiffs had not performed, and plaintiffs by replication admitted the making of such contract, but alleged that defendant had broken the same and that it was subsequently agreed that plaintiffs should receive extra pay for hauling ties an extra distance, evidence as to the number of ties hauled beyond the limit was not objectionable on the ground that the only contract pleaded in the complaint was the written contract referred to in the answer.—*Cook & Woldson v. Gallatin Railroad Co.*, 509.

Quantum Meruit—Special Contract—Evidence.

4. Where suit was brought on a *quantum meruit* for ties delivered under a written contract which defendant had broken, evidence that plaintiffs had not hauled all of the ties required by such written contract was properly excluded.—*Cook & Woldson v. Gallatin Railroad Co.*, 509.

Quantum Meruit—Evidence.

5. Where, in an action on a *quantum meruit* for hauling railroad ties, defendant set up damages for delay and interruption of track laying, etc., particularly averring the year, month, and days, on which the delays occurred, questions asked in support of such counterclaim, not referring to the dates specified, were properly excluded.—*Cook & Woldson v. Gallatin Railroad Co.*, 509.

Quantum Meruit—Counterclaim.

6. In an action for services in delivering ties to a railroad company, defendant was not entitled to recover, by way of counterclaim, damages for delays alleged to have occurred after the suit was commenced.—*Cook & Woldson v. Gallatin Railroad Co.*, 509.

Quantum Meruit—Instruction.

7. Where, in an action to recover the wages of a watchman appointed to guard a certain railroad camp, the evidence would have warranted a finding that defendant's vice president and general manager had never agreed to pay for the watchman, and there was nothing to show how many days the watchman worked, etc., whether the amount sued for was a reasonable and proper allowance for his services was for the jury, and it was therefore error for the court to charge that if the jury believed the plaintiffs' evidence their verdict should be for the plaintiffs in the amount sued for, and if they did not believe plaintiffs' evidence they should find for defendant.—*Cook & Woldson v. Gallatin Railroad Co.*, 509.

ATTORNEYS.

Contingent Fees—Contract—Abandonment—Compensation.

1. A contract for the professional services of an attorney in contesting a will provided that "your fee, in case the will is defeated and our clients get their shares, shall be one hundred thousand dollars," etc. Afterwards a compromise was effected—the attorney taking part therein—and the contest was dismissed. *Held*, that by the terms of the contract the attorney was only entitled to the stipulated fee in the event the will was actually defeated, and in compromising the case the contract was abandoned, and recovery by the attorney, if at all, must be on a *quantum meruit*.—*Harris v. Root*, 159.

Compromise of Litigation—Authority.

2. *Obiter*: An attorney, as such, has no authority to compromise a controversy for his client,—a general retainer in a case does not imply such authority; there must be special authority delegated for that purpose, or a ratification by the client, otherwise the compromise agreement, as well as any judgment entered in pursuance thereof, is void at the option of the client.—*Harris v. Root*, 159.

Contingent Fees—Contract—Abandonment—Compensation.

3. Where a contract is for a stipulated fee contingent upon the performance of specific services by an attorney, and said services are not performed, the measure of recovery by the attorney is the value of the services actually rendered, and not the amount of the stipulated fee, notwithstanding the rendering of the specific services was prevented by the client, or by circumstances over which he had no control.—*Harris v. Root*, 159.

Compensation—Conditional Contract—Client's Dismissal of Appeal—Effect.

4. Where an attorney contracts to perform services in pending suits for a certain sum, a portion of which is to be paid in installments upon their favorable termination, and sues upon the contract, the fact that adverse judgments were rendered will defeat his recovery, though the client, on the advice of another attorney, dismissed appeals therefrom; the proper remedy being to sue on a *quantum meruit*.—*Foley v. Kleinschmidt*, 198.

Attorney's Lien—Foreclosure—Pleading.

5. In an action against McDonald, Knox, Maloney and Cobban to establish and enforce an attorney's lien the complaint alleged: that plaintiffs were employed by McDonald, as her attorneys, to prosecute an action on her behalf against Knox in the district court; that they performed the services

required of them, and obtained a judgment in their client's favor for \$331.65; that such action had been tried in a justice's court, and from a judgment rendered therein in favor of their client an appeal had been taken to the district court by the losing party; that the ordinary undertaking had been given with the defendants Maloney and Cobban as sureties thereon; that for the services rendered by plaintiffs, \$300.00 was a reasonable attorney's fee; that no part thereof had been paid; and that no part of the judgment obtained by McDonald in the district court had ever been paid. To this complaint separate demurrers were interposed by the defendants, the grounds of which were: (1) Misjoinder of parties; (2) misjoinder of causes of action; and (3) failure to state facts sufficient to constitute a cause of action. *Held*, that the demurrers were not well taken.—*Coombe et al. v. Knox et al.*, 202.

Suspension from Practice—Reinstatement—Sufficiency of Petition.

6. An attorney who has been suspended for two years for malpractice and criminal deceit, whereby he obtained money from a client, will not be reinstated at the end of one year on a petition, signed by lawyers and citizens, reciting that he was suspended because he was indebted to the client, and which does not express any regret for his culpable acts, nor contain any assurance from him or the other petitioners that his future conduct will be upright.—*In re Weed*, 264.

BANKRUPTCY.

Preference—Knowledge of Creditor—Pleading—Burden of Proof.

1. Bankruptcy Act (Act of Congress July 1, 1898), Section 60b, provides that if a bankrupt shall have given a preference within four months before the filing of the petition, or after filing the petition and before adjudication, and the person receiving it shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, etc. *Held*, that where a petition to avoid an alleged preference failed to allege that the preferred creditor had reasonable cause to believe that the bankrupt by suffering judgment to be recovered intended to give such creditor a preference, within the meaning of the bankruptcy act, it was insufficient, since the burden of proof was on the petitioner to sustain such proposition.—*Greene v. Montana Brewing Co.*, 380.

Judgments—Satisfaction Before Bankruptcy.

2. Bankruptcy Act (Act of Congress July 1, 1898), Section 67f, provides that certain liens, including judgment liens obtained through legal proceedings against an insolvent within four months prior to the filing of a bankruptcy petition against him, in case he is adjudicated a bankrupt, shall be void, and the property affected shall pass to the trustee. *Held*, that such section affects only the lien of a judgment recovered within four months before the filing of a bankruptcy petition, and not the judgment itself, and hence, where property has been sold under execution, and the judgment satisfied, before the filing of the petition, there was no judgment lien which could be released, within such section, and the trustee was not entitled to recover against the creditor thereunder the proceeds of the property so sold.—*Greene v. Montana Brewing Co.*, 380.

BILL OF EXCEPTIONS.

See APPEAL, 40, 69.

NEW TRIAL, 9, 12.

REFEREES, 1.

BONA FIDE PURCHASER.

See FRAUDULENT CONVEYANCES.

BRIEFS.

See RULES OF SUPREME COURT.

APPEAL, 65.

BURDEN OF PROOF.

See CARRIERS, 1, 7.

CONTRACTS, 2, 6.

CONVERSION, 1.

PROMISSORY NOTES, 4, 5.

WILLS, 1.

CARRIERS.

See PLEADINGS (CIVIL), 8, 9, 10, 11.

Liability—Common Law Duties—Special Contract—Burden of Proof.

1. Where a common carrier, accepting property for transportation, commits a breach of its common-law duties, the shipper may maintain an action in tort therefor, though the carrier receives the property under a special contract limiting its liability; the carrier in accepting the shipment accepting it with the obligations imposed by law, and the special contract merely constituting a defense in so far as the exemptions from liability which it creates are valid must be pleaded as a defense, and the burden of proof rests on the defendant to establish it.—*Nelson v. Great Northern Ry. Co.*, 297.

Transportation of Live Stock—Liability.

2. Where the special contract entered into between the shipper and the carrier (a railroad company) provides that the shipper shall attend, water and feed the live stock shipped, such contract relieves the carrier from all duty and obligation respecting such matters, but does not relieve it of the duty imposed by law of properly handling its trains, and of affording reasonable facilities for enabling the shipper to give the live stock proper care and attention.—*Nelson v. Great Northern Ry. Co.*, 297.

Transportation of Live Stock—Liability—Evidence.

3. In tort against a common carrier for delay in the transportation of sheep the shipper could show the condition of the sheep at the time of their shipment, and, whether evidence of the treatment and food received by the sheep immediately prior to the shipment was a correct way to show this condition or not, defendant was not prejudiced by such evidence, admitted without objection, where the court charged the jury not to consider any damages sustained prior to the loading of the sheep on the carrier's cars.—*Nelson v. Great Northern Ry. Co.*, 297.

Transportation of Live Stock—Measure of Liability.

4. Where a contract for the transportation of sheep by a common carrier fixes a valuation on the sheep per head, the measure of the liability of the carrier for damages resulting from a breach of its duties causing injury to the sheep is the amount of the actual damage not exceeding the stipulated valuation per head.—*Nelson v. Great Northern Ry. Co.*, 297.

Delay in Transportation—Negligence—Special Contract.

5. Under Civil Code, Sections 2876, 2877, 2912, a common carrier cannot by special contract limit its liability for delay in the transportation of property arising from its own or its servants' negligence.—*Nelson v. Great Northern Ry. Co.*, 297.

Delay in Transportation—Negligence—Liability.

6. Where property delivered to a carrier for transportation is injured as a result of negligent delay on the carrier's part, the shipper, free from negligence on his part, is entitled to compensation for the damages sustained by reason of such delay.—*Nelson v. Great Northern Ry. Co.*, 297.

Delay in Transportation of Live Stock—Liability—Burden of Proof.

7. Where animals delivered to a common carrier for transportation are injured during the transportation, and there is no evidence to show that the animals were injured from an inherent want of vitality, or by reason of injuries inflicted on each other, or by unavoidable accident, the carrier has the burden of proving that the injuries were occasioned by some other cause than its own negligence, though the shipper accompanies the shipment.—*Nelson v. Great Northern Ry. Co.*, 297.

Delay in Transportation of Live Stock—Liability—Instruction.

8. In an action against a common carrier for injuries to sheep transported by it caused by its negligent delay in their transportation and by exposing them to severe weather, defendant's witnesses testified that they informed plaintiff at the time of shipment that the worst blizzard ever known was prevailing along its line of road. Plaintiff denied receiving this information. *Held*, that the evidence warranted an instruction that if the carrier, at the time of accepting the shipment, knew of the storm along its line, and did not inform plaintiff thereof, it could not excuse the delay by showing that its track was obstructed by snow blockades.—*Nelson v. Great Northern Ry. Co.*, 297.

Delay in Transportation of Live Stock—Liability.

9. A common carrier receiving property for transportation with knowledge of the existence of an obstruction on its road, and without informing the shipper, cannot offer the obstruction as an excuse for not making a prompt delivery thereof, though the obstruction is the act of God; and it is bound to take notice of the signs of approaching danger liable to create obstructions, if any are known to it.—*Nelson v. Great Northern Ry. Co.*, 297.

Special Contract—Notice of Damage or Loss.

10. A special contract with a railroad company for the transportation of property required that in case of loss or claim for damages the shipper should give notice in writing to it. The railroad received information of the injury to the property by letter, and the railroad department called for information regarding the same shortly after the shipment was made. *Held*, a sufficient notice when not objected to.—*Nelson v. Great Northern Ry. Co.*, 297.

Delay in Transportation of Live Stock—Negligence—Liability—Instruction—Double Damages.

11. In an action against a common carrier for injuries to sheep transported by it, caused by negligent delay in their transportation and by ex-

posing them to severe weather, the shipper testified that there was a shrinkage of the sheep during the transportation of 33 pounds per head, or 25 pounds in excess of a reasonable shrinkage; that it was necessary to feed them four days at the place of delivery before selling them, while feeding them once only might have been necessary if they had been delivered in good condition; that the cost of so feeding them was \$240, and the cost of one feeding was \$40; that the sheep were weighed before and after they were fed this extra \$200 worth of food. It did not appear which of these weights was taken as the basis of calculation in ascertaining the shrinkage. *Held*, that an instruction authorizing a recovery of the expenses for feeding rendered necessary by reason of the condition of the sheep at the place of delivery was erroneous, as allowing double damages.—*Nelson v. Great Northern Ry. Co.*, 297.

CERTIORARI.

When Will Lie.

In order that *certiorari* may lie, three requisites are indispensable, namely: excess of jurisdiction; absence of the right of appeal; and lack of any other plain, speedy and adequate remedy.—*State ex rel. Weinstein Co. v. District Court*, 445.

CHAMPERTY.

See CRIMINAL LAW, 6.

CHATTEL MORTGAGES.

See CONVERSION, 3, 4.

Title in Third Person—Evidence—Hearsay.

1. Testimony, by a mortgagee of personalty, that the one who it was claimed had purchased it told him that the owners said the sale could be made if he, the mortgagee, was willing, was inadmissible as hearsay.—*Reynolds v. Fitzpatrick et al.*, 170.

Fraudulent Mortgage—Possession by Mortgagor.

2. Where a chattel mortgagee permitted the mortgagor to retain possession of the goods, and to sell and dispose of them without accounting for the proceeds to the mortgagee, the mortgage was fraudulent as to creditors and subsequent purchasers from the mortgagor in good faith.—*Stevens et al. v. Curran et al.*, 366.

Fraudulent Mortgage—Possession by Mortgagor—Evidence.

3. Where it was claimed that a chattel mortgage was void as to subsequent purchasers of the goods mortgaged, by reason of the fact that the mortgagor was permitted to remain in possession and sell the goods without accounting to the mortgagee, extrinsic evidence was admissible to show the conditions actually existing and the conduct of the parties with reference to the mortgaged property.—*Stevens et al. v. Curran et al.*, 366.

Fraudulent Mortgage—Rights of Purchasers—Lien.

4. Where plaintiffs purchased certain goods covered by a chattel mortgage from the mortgagor, and retained actual possession of them, and the court found that the sale to plaintiffs was valid, it was not necessary for plain-

riffs to obtain a judgment or levy an attachment on the goods as a condition precedent to their right to assail the mortgage in an action against the sheriff for seizing the goods thereunder.—*Stevens et al. v. Curran et al.*, 366.

Rights of Third Persons—Intention of Mortgagor or Mortgagee.

5. In determining the rights of third persons, the instrument and the conduct of the parties thereto must be looked to, irrespective of the intention of the mortgagor or mortgagee.—*Stevens et al. v. Curran et al.*, 366.

CLAIM AND DELIVERY.

See JUDGMENTS, 4.
ACTIONS, 1.

CONSPIRACY.

See CRIMINAL LAW, 5.

CONSTITUTION.

List of Sections Cited or Commented Upon.

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Eminent Domain.

1. Section 14 of Article III of the Constitution is both mandatory and prohibitory, and it is also self-executing.—*Less v. City of Butte*, 27.

Eminent Domain.

2. *Obiter*: The Constitution (Article III, Section 14) does not authorize a remedy for every diminution in the value of property that is caused by public improvements; the damages for which compensation is to be made being a damage to the property itself, and not including mere infringement of the owner's personal pleasure or enjoyment.—*Less v. City of Butte*, 27.

Construction.

3. The declarations of constitutions are not to be "frittered away by construction."—*Less v. City of Butte*, 27.

District Judges—Disqualification—Bias or Prejudice.

4. The Act of the Eighth legislative assembly, entitled "An Act to provide for the designation and appointment of a district judge to temporarily hold

court in another district than his own, and to perform the official duties of the district judge of such district, where such judge is biased or prejudiced or for any cause disqualified from performing the same" (Laws of 1903, Chapter 42), *held* to be unconstitutional.—*In re Weston*, 207.

Constitution—Mandatory and Prohibitory.

5. Constitution, Article III, Section 29, providing that "the provisions of this constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise," is conclusive upon the legislature, and prevents the enactment of any law which has for its purpose the extension or limitation of the powers conferred by the constitution.—*In re Weston*, 207.

Supreme Court.

6. Under Constitution, Article IV, Section 1, the legislature cannot impose upon the supreme court, or its justices, the performance of an act not judicial in its character but purely ministerial or executive.—*In re Weston*, 207.

Constitutional Question—When Determined.

7. A court will not pass upon the constitutionality of a statute unless it is absolutely necessary to a decision of the case.—*State v. King*, 268.

Constitutionality of Statute—Sufficiency of Title.

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Specific Performance—Adequacy of Consideration.

7. Where, at the time of the making of an agreement to assign certain mining leases, options, and bonds, it was admitted that the assignor had expended at least \$54,000 in developing the mine, without exposing any ore of commercial value, when the assignee agreed, in consideration of the assignment, to keep up the leases and bonds, continue the development, and, if the property appeared to the assignee to justify its purchase, to pay the assignor \$54,000 therefor, without further risk or liability to the assignor, and thereafter the assignee made discoveries of great value in the mine, a finding that the consideration for the contract was not so inadequate as to preclude a decree of specific performance was justified, since the point of time to which the question of adequacy relates is the time of the formation of the contract.—*Finlen v. Heinze et al.*, 548.

Specific Performance—Pleadings—Decree—Review.

8. Where an action to recover an interest in a mining claim was tried on the issues raised by the counterclaim seeking specific performance of an alleged contract by plaintiff to convey his interest in such claim to defendant, and the answer thereto, a decree of specific performance would not be reversed on the ground that defendant's answer to plaintiff's complaint alleged that plaintiff had forfeited all his rights to the mine prior to the date of the agreement sought to be enforced.—*Finlen v. Heinze et al.*, 548.

CONVERSION.

Conversion of Mortgaged Property—Title in Third Person—Burden of Proof.

1. In an action for conversion the burden is upon plaintiff to show either title or right of possession in himself. Proof on the part of defendant of title and possession in a third person would constitute an absolute defense to the action.—*Reynolds v. Fitzpatrick et al.*, 170.

Conversion of Mortgaged Property—Title in Third Person—Evidence.

2. In an action for conversion, plaintiff did not claim to be the owner of the property converted, but claimed the right to the immediate possession thereof by reason of an alleged default in the terms of a verbal mortgage claimed by him to recover the property. Held error to exclude testimony that, prior to any assertion by plaintiff of his rights under the mortgage, the mortgagor, who then had possession of the property, had sold the same to a third person, who had no notice of plaintiff's rights, as this evidence tended to show title in the third person, and therefore to defeat the action.—*Reynolds v. Fitzpatrick et al.*, 170.

Conversion of Mortgaged Property—Demand.

3. Where the act of a sheriff in seizing goods under a mortgage from plaintiffs, who were purchasers thereof from the chattel mortgagor, was wrongful in the beginning, no demand was necessary to entitle plaintiffs to sue the sheriff for conversion of the goods.—*Stevens et al. v. Curran et al.*, 366.

Conversion of Mortgaged Property—Complaint.

4. In an action for conversion, an allegation that defendants converted and disposed of the property to their own use is an allegation of fact sufficient, in the absence of a special demurrer, to sustain a judgment for plaintiff.—*Stevens et al. v. Curran et al.*, 366.

CORPORATIONS.

See TAXATION, 10, 11.

Officers—Powers—Acts *Ultra Vires*.

1. Where defendant's articles of incorporation provided that it was organized to buy and sell wood, etc., and the minutes of a stockholders' meeting showed a motion, duly passed, ratifying certain contracts modifying a prior contract with N, employing him to manage the business, such contracts were not objectionable on the ground that their execution by the officers were acts *ultra vires*.—*Tague v. John Caplice Co.*, 51.

Officers—Powers—Presumption.

2. In the absence of any proof to the contrary, the executive officers of a corporation executing a contract under the corporate seal, in the name and on the behalf of the corporation, with reference to business comprehended in the articles of incorporation, and in which it is shown that the corporation is actually engaged at the time, will be presumed to have full authority to bind the corporation by such act, and by the declarations and admissions contained in the contract itself, hence such contract is not objectionable for failure to prove the authority of the officers to execute the same.—*Tague v. John Caplice Co.*, 51.

Liability of Stockholders—Statute of Limitations.

3. Under Compiled Statutes of 1887, Division V, Section 457, providing that the stockholders of every company incorporated under the act shall be liable to the creditors of the company to the amount of unpaid stock held by them, etc., the liability of the stockholders arises only after execution on a judgment against the corporation has been returned unsatisfied, and limitations do not begin to run against an action against the stockholders until such time.—*King v. Pony Gold Mining Co.*, 74.

Foreign Corporations.

4. The legislature has the right to prescribe reasonable terms upon which foreign corporations may do business in the state.—*Northwestern Mutual Life Ins. Co. v. Lewis and Clarke County*, 484.

COSTS.

See APPEAL, 65.

Power to Allow.

1. The power to allow costs is purely statutory, and unless some statutory authority exists for their allowance, an allowance thereof is erroneous.—*Colusa Parrot M. & S. Co. v. Barnard*, 11.

Injunction *Pendente Lite*—Refusal.

2. An allowance to defendant, on the refusal of a motion for an injunction *pendente lite*, of "all costs," is erroneous.—*Colusa Parrot M. & S. Co. v. Barnard*, 11.

Witnesses—Mileage.

3. Political Code, Section 4648, provides that witnesses "attending" a trial are entitled to ten cents a mile each way from their place of residence

to the place of trial; and Section 1866 provides that the party to whom costs are awarded is entitled to the mileage of witnesses, etc. *Held*, that a party to whom costs were awarded was entitled to mileage for witnesses who appeared and testified, irrespective of whether they were legally subpoenaed.—*McGlauffin v. Wormser*, 177.

Order Refusing to Disallow Costs—Appeal.

4. An order after final judgment for defendant, refusing to disallow his costs, is reviewable on appeal from the judgment, and not on an independent appeal; the costs being a part of the judgment.—*Spencer et al. v. Mungus et al.*, 357.

Allowance to Defendant.

5. Code of Civil Procedure, Section 1851, allows costs, of course, to the plaintiff, on his recovering a judgment in excess of \$50 in an action for money or damages. Section 1852 provides that costs must be allowed, of course, to the defendant, upon a judgment in his favor. Section 1853 provides that no costs can be allowed in an action for the recovery of money or damages when the plaintiff fails to recover more than \$50. *Held*, that costs were properly allowed defendant on his recovering \$35 under a counterclaim.—*Spencer et al. v. Mungus et al.*, 357.

COUNTY COMMISSIONERS.

Powers—Contracts—Suits—Employing Counsel.

1. A contract with an attorney for his services, entered into by the chairman of the board of county commissioners, individually, is not binding on the county, where the first and only action of the board with reference thereto, is the allowing of a portion of the attorney's claim for legal services rendered in pursuance of the contract, since the commissioners have power to bind the county only where they act as a legal entity.—*Williams et al. v. Board of Commissioners of Broadwater County*, 360.

Powers—Suits—Employing Counsel—County Not a Party.

2. If under Political Code, Section 4230, the board of county commissioners has power to employ counsel (which is not decided), it has none whatever to employ counsel to prosecute a suit by an employee of the board against an officer of the county, where the county is not a party to the suit.—*Williams et al. v. Board of Commissioners of Broadwater County*, 360.

CRIMINAL LAW.

Proof of Venue—Murder.

1. In a prosecution for murder, evidence considered, and *held* to show that the crime was committed in the county alleged in the indictment.—*State v. Hardee*, 18.

Homicidal Monomania—Evidence.

2. In a prosecution for murder, evidence considered, and *held* to show too much deliberation to be the result of any sudden impulse, and to be incompatible with the theory that the defendant was afflicted with homicidal monomania.—*State v. Hardee*, 18.

New Trial--Insanity--Newly Discovered Evidence.

3. Where, in a prosecution for murder, the insanity of defendant was placed in issue, in support of which defendant called witnesses who testified, and the facts to be proved by newly discovered evidence were merely cumulative on that issue, and were not such as to make it clearly probable that a different result would follow another trial, nor was it shown that they could not have been produced on the former trial by the exercise of reasonable diligence, a new trial was properly refused.—*State v. Hardee*, 18.

Police Officer--Failure to Make Arrest--Information.

4. Laws of 1903, Chapter CXI, Section 1, declares that it shall be the duty of every policeman or other peace officer, upon being informed by a citizen that any offense is being or is about to be committed within such officer's jurisdiction, to immediately proceed to the place where the alleged offender is to be found, with the informant, if he so requests, and to arrest such offender, etc. *Held*, that an information against a policeman, alleging that he refused to proceed to the place where alleged offenders were to be found, was insufficient, the statute enjoining but one duty, which was to make an arrest, failure to perform which was the gist of the officer's offense.—*State v. King*, 268.

Conspiracy to Falsely Maintain Suit, etc.

5. Where, at the time of the making of an agreement to assign certain mining leases, options, and bonds, the assignor had made explorations along the vein, and had concluded that an adjoining mine owner was trespassing on a vein having its apex within the boundaries of the mine leased and assigned, either the assignor or the assignee might have prosecuted such alleged trespass; and hence the fact that the assignment required that the assignor should prosecute such action for the benefit of the assignee, who agreed to pay the expenses of the litigation, did not render the contract void as a conspiracy within Penal Code, Section 320, making it a misdemeanor for persons to conspire falsely to maintain any suit, etc.—*Finlen v. Heinze et al.*, 548.

Champertry.

6. Where an assignor of an interest in a mining claim retained a contingent interest in the property, his agreement, which was a part of the assignment, to prosecute a suit in his own name against an alleged trespasser for the benefit of the assignee, at the latter's expense, was not champertous.—*Finlen v. Heinze et al.*, 548.

CROSS-EXAMINATION.

Error Without Prejudice.

In view of the presumption that the court below did not consider incompetent testimony in refusing an injunction *pendente lite*, improper cross-examination of plaintiff's witnesses is not ground for reversal, no injury having been shown.—*Colusa Parrot M. & S. Co. v. Barnard*, 11.

DAMAGES.

Measure of Damages--Instruction.

1. Civil Code, Section 4330, provides that for the breach of an obligation not arising from contract the measure of damages is the amount which will

compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not. *Held*, that an instruction, in an action by an employe, that, if she was injured by defendants' negligence, she was entitled to recover what would compensate for all damage "proximately caused by the negligence of defendants, whether such damage could be anticipated or not," was not objectionable for failing to specify by whom the damage need not be anticipated, where there is no showing in the record that appellants asked for any more definite declaration upon the subject.—*Coleman v. Perry*, 1.

Eminent Domain—Streets.

2. Under Constitution, Article III, Section 14, declaring that private property shall not be taken "or damaged" for public use without just compensation, a landowner is entitled to compensation for damages owing to the grading of a street on which his property abuts, in accordance with a grade fixed by city, notwithstanding the fact that such grade is the first one ever fixed.—*Less v. City of Butte*, 27.

Nominal Damages—Instruction.

3. In a suit for the conversion of personalty, and also damages for a trespass on realty possessed by plaintiff as a tenant, it is error to instruct that the burden is on the plaintiff to show his right to the possession of "the property in controversy," since, though the leasehold was in controversy, plaintiff was—under the proofs adduced—entitled to nominal damages for the defendant's trespass thereon.—*Yoder v. Reynolds*, 183.

Nominal Damages.

4. Where a sheriff levies on personalty in defendant's warehouse, and remains in possession of the premises, defendant is entitled to nominal damages, even though no special damage is shown.—*Yoder v. Reynolds*, 183.

Carriers—Liability—Measure of Damages.

5. Where a contract for the transportation of sheep by a common carrier fixes a valuation on the sheep per head, the measure of the liability of the carrier for damages resulting from a breach of its duties causing injury to the sheep is the amount of the actual damage not exceeding the stipulated valuation per head.—*Nelson v. Great Northern Ry. Co.*, 297.

Double Damages—Instruction.

6. For an instruction held to be erroneous as allowing double damages, see *Nelson v. Great Northern Ry. Co.*, 297.

DOWER.

Rights of Widow—Heir of Husband—Dower.

1. The wife's right to dower or election under Sections 228 and 236 (Civil Code), are separate from her rights as an heir of her husband under Section 1852, and hence the fact that she participated in the distribution of the estate as an heir of her husband does not constitute a waiver of the right of election to take one-half of the residue after payment of debts, under Section 236.—*Dahlman v. Dahlman et al.*, 373.

Probate—Jurisdiction of Court—Dower.

2. When a court is exercising its probate jurisdiction, it has no power with reference to dower, and can make no orders affecting a widow's dower right.—*In re Dahman's Estate*, 379.

DURESS.

Promissory Note—Evidence.

1. Evidence considered, and *held* insufficient to sustain a jury finding that the note sued on was executed under duress.—*Bullard v. Smith*, 387.

Promissory Note—Burden of Proof.

2. In an action on a note, the burden of proving duress is on defendant.—*Bullard v. Smith*, 387.

EASEMENTS.

Air—Light—Access.

The owner of a city lot has an easement in the public street for the purpose of giving to such land facilities of light, of air, and of access from such street.—*Less v. City of Butte*, 27.

EMINENT DOMAIN.

See CONSTITUTION, 1, 2.

EQUITY.

Instructions—Appeal—Review.

1. On appeal in a suit in equity, alleged error in instructions cannot be considered; the verdict being merely advisory.—*King v. Pony Gold Mining Co.*, 74.

Admission of Incompetent Evidence—Presumption.

2. Admission of incompetent evidence in an equity case is not reversible error, it being presumed that the court considered competent evidence only, except where it clearly appears from the record that the court actually considered the incompetent evidence in making up its findings, or where the record—containing all the evidence—does not disclose sufficient competent evidence to warrant the findings.—*King v. Pony Gold Mining Co.*, 74.

Warranty Deed—Equitable Mortgage—Equitable Relief.

3. A grantor cannot maintain a suit in equity for the sole purpose of having a deed absolute on its face declared a mortgage, but must also offer to redeem the property, and place himself wholly within the jurisdiction of the court to settle the whole controversy between him and his grantee.—*Mack v. Hill*, 99.

Instructions in Chancery Case.

4. Since a suit to foreclose a mechanic's lien is a proceeding in chancery, the jury's findings are only advisory, and error in instructing them is not reviewable.—*Cook et al. v. Gallatin Railroad Co. et al.*, 340.

ESTOPPEL.

See APPEAL, 31.

EVIDENCE.

Expert Evidence.

1. Whether a laundry mangle is defective is a proper subject for expert evidence.—*Coleman v. Perry*, 1.

Issues—Stipulation—Inadmissible Evidence.

2. In an action to enjoin defendants from diverting certain waters claimed by plaintiffs for irrigation purposes, the parties stipulated that no question should be made as to the titles of the respective parties to the lands described in the pleadings, and in connection with which the water claimed by each was to be used. *Held*, that evidence that defendants' premises were located upon an Indian reservation, which they could not lawfully occupy, was inadmissible.—*Phillips v. Coburn*, 45.

Water Rights—Priority of Appropriation.

3. In an action involving the priority of appropriations of certain water rights plaintiffs contended that the appropriation made by their predecessor in interest was made in July of a certain year, and the court found that the appropriation was made in October of that year. *Held* that, notwithstanding this finding, evidence of declarations made by plaintiffs' predecessor in interest, tending to show that in August of the year in question they had made no appropriation, was admissible under Code of Civil Procedure, Section 3125.—*Phillips v. Coburn*, 45.

Pleadings in Other Suits.

4. Where, in an action for money loaned, defendant claimed that plaintiff and C. were partners, and that the money was loaned by plaintiff to be used in their business, and thereafter the notes of a third person who conducted the business for the firm were received by plaintiff in settlement of the advancement, a verified complaint in an action by defendant against the wife of such manager, in which defendant claimed to be the owner of such business, was admissible.—*Tague v. John Caplice Co.*, 51.

Action for Money Loaned—Defense—Notes Taken in Payment of the Debt.

5. Where, in an action for money loaned, there was no evidence that plaintiff had any knowledge that defendant intended to loan the money to N., or that plaintiff had agreed to accept N.'s notes in payment of the loan to defendant, the notes executed by N., some of which were made payable to defendant, and some to plaintiff by direction of defendant's trustees, without authority from plaintiff, were inadmissible.—*Tague v. John Caplice Co.*, 51.

Chattel Mortgage—Hearsay.

6. Testimony, by a mortgagee of personalty, that the one who it was claimed had purchased it told him that the owners said the sale could be made if he, the mortgagee, was willing, was inadmissible as hearsay.—*Reynolds v. Fitzpatrick et al.*, 170.

court in another district than his own, and to perform the official duties of the district judge of such district, where such judge is biased or prejudiced or for any cause disqualified from performing the same" (Laws of 1903, Chapter 42), *held* to be unconstitutional.—*In re Weston*, 207.

Constitution—Mandatory and Prohibitory.

5. Constitution, Article III, Section 29, providing that "the provisions of this constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise," is conclusive upon the legislature, and prevents the enactment of any law which has for its purpose the extension or limitation of the powers conferred by the constitution.—*In re Weston*, 207.

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6. Under Constitution, Article IV, Section 1, the legislature cannot impose upon the supreme court, or its justices, the performance of an act not judicial in its character but purely ministerial or executive.—*In re Weston*, 207.

Constitutional Question—When Determined.

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6. Code of Civil Procedure, Section 4417, provides that specific performance cannot be enforced against a party to a contract if he has not received an adequate consideration therefor. *Held* that, while a party seeking specific performance of a contract is required to set forth the consideration therefor, the burden of proof that such consideration is inadequate is on the party resisting specific performance.—*Finlen v. Heinze et al.*, 548.

Specific Performance—Adequacy of Consideration.

7. Where, at the time of the making of an agreement to assign certain mining leases, options, and bonds, it was admitted that the assignor had expended at least \$54,000 in developing the mine, without exposing any ore of commercial value, when the assignee agreed, in consideration of the assignment, to keep up the leases and bonds, continue the development, and, if the property appeared to the assignee to justify its purchase, to pay the assignor \$54,000 therefor, without further risk or liability to the assignor, and thereafter the assignee made discoveries of great value in the mine, a finding that the consideration for the contract was not so inadequate as to preclude a decree of specific performance was justified, since the point of time to which the question of adequacy relates is the time of the formation of the contract.—*Finlen v. Heinze et al.*, 548.

Specific Performance—Pleadings—Decree—Review.

8. Where an action to recover an interest in a mining claim was tried on the issues raised by the counterclaim seeking specific performance of an alleged contract by plaintiff to convey his interest in such claim to defendant, and the answer thereto, a decree of specific performance would not be reversed on the ground that defendant's answer to plaintiff's complaint alleged that plaintiff had forfeited all his rights to the mine prior to the date of the agreement sought to be enforced.—*Finlen v. Heinze et al.*, 548.

CONVERSION.

Conversion of Mortgaged Property—Title in Third Person—Burden of Proof.

1. In an action for conversion the burden is upon plaintiff to show either title or right of possession in himself. Proof on the part of defendant of title and possession in a third person would constitute an absolute defense to the action.—*Reynolds v. Fitzpatrick et al.*, 170.

Conversion of Mortgaged Property—Title in Third Person—Evidence.

2. In an action for conversion, plaintiff did not claim to be the owner of the property converted, but claimed the right to the immediate possession thereof by reason of an alleged default in the terms of a verbal mortgage claimed by him to recover the property. *Held* error to exclude testimony that, prior to any assertion by plaintiff of his rights under the mortgage, the mortgagor, who then had possession of the property, had sold the same to a third person, who had no notice of plaintiff's rights, as this evidence tended to show title in the third person, and therefore to defeat the action.—*Reynolds v. Fitzpatrick et al.*, 170.

Conversion of Mortgaged Property—Demand.

3. Where the act of a sheriff in seizing goods under a mortgage from plaintiffs, who were purchasers thereof from the chattel mortgagor, was wrongful in the beginning, no demand was necessary to entitle plaintiffs to sue the sheriff for conversion of the goods.—*Stevens et al. v. Curran et al.*, 366.

Conversion of Mortgaged Property—Complaint.

4. In an action for conversion, an allegation that defendants converted and disposed of the property to their own use is an allegation of fact sufficient, in the absence of a special demurrer, to sustain a judgment for plaintiff.—*Stevens et al. v. Curran et al.*, 366.

CORPORATIONS.

See TAXATION, 10, 11.

Officers—Powers—Acts *Ultra Vires*.

1. Where defendant's articles of incorporation provided that it was organized to buy and sell wood, etc., and the minutes of a stockholders' meeting showed a motion, duly passed, ratifying certain contracts modifying a prior contract with N, employing him to manage the business, such contracts were not objectionable on the ground that their execution by the officers were acts *ultra vires*.—*Tague v. John Caplice Co.*, 51.

Officers—Powers—Presumption.

2. In the absence of any proof to the contrary, the executive officers of a corporation executing a contract under the corporate seal, in the name and on the behalf of the corporation, with reference to business comprehended in the articles of incorporation, and in which it is shown that the corporation is actually engaged at the time, will be presumed to have full authority to bind the corporation by such act, and by the declarations and admissions contained in the contract itself, hence such contract is not objectionable for failure to prove the authority of the officers to execute the same.—*Tague v. John Caplice Co.*, 51.

Liability of Stockholders—Statute of Limitations.

3. Under Compiled Statutes of 1887, Division V, Section 457, providing that the stockholders of every company incorporated under the act shall be liable to the creditors of the company to the amount of unpaid stock held by them, etc., the liability of the stockholders arises only after execution on a judgment against the corporation has been returned unsatisfied, and limitations do not begin to run against an action against the stockholders until such time.—*King v. Pony Gold Mining Co.*, 74.

Foreign Corporations.

4. The legislature has the right to prescribe reasonable terms upon which foreign corporations may do business in the state.—*Northwestern Mutual Life Ins. Co. v. Lewis and Clarke County*, 484.

COSTS.

See APPEAL, 65.

Power to Allow.

1. The power to allow costs is purely statutory, and unless some statutory authority exists for their allowance, an allowance thereof is erroneous.—*Colusa Parrot M. & S. Co. v. Barnard*, 11.

Injunction *Pendente Lite*—Refusal.

2. An allowance to defendant, on the refusal of a motion for an injunction *pendente lite*, of "all costs," is erroneous.—*Colusa Parrot M. & S. Co. v. Barnard*, 11.

Witnesses—Mileage.

3. Political Code, Section 4648, provides that witnesses "attending" a trial are entitled to ten cents a mile each way from their place of residence

to the place of trial; and Section 1866 provides that the party to whom costs are awarded is entitled to the mileage of witnesses, etc. *Held*, that a party to whom costs were awarded was entitled to mileage for witnesses who appeared and testified, irrespective of whether they were legally subpoenaed.—*McGlaughlin v. Wormser*, 177.

Order Refusing to Disallow Costs—Appeal.

4. An order after final judgment for defendant, refusing to disallow his costs, is reviewable on appeal from the judgment, and not on an independent appeal; the costs being a part of the judgment.—*Spencer et al. v. Mungus et al.*, 357.

Allowance to Defendant.

5. Code of Civil Procedure, Section 1851, allows costs, of course, to the plaintiff, on his recovering a judgment in excess of \$50 in an action for money or damages. Section 1852 provides that costs must be allowed, of course, to the defendant, upon a judgment in his favor. Section 1853 provides that no costs can be allowed in an action for the recovery of money or damages when the plaintiff fails to recover more than \$50. *Held*, that costs were properly allowed defendant on his recovering \$35 under a counterclaim.—*Spencer et al. v. Mungus et al.*, 357.

COUNTY COMMISSIONERS.

Powers—Contracts—Suits—Employing Counsel.

1. A contract with an attorney for his services, entered into by the chairman of the board of county commissioners, individually, is not binding on the county, where the first and only action of the board with reference thereto, is the allowing of a portion of the attorney's claim for legal services rendered in pursuance of the contract, since the commissioners have power to bind the county only where they act as a legal entity.—*Williams et al. v. Board of Commissioners of Broadwater County*, 360.

Powers—Suits—Employing Counsel—County Not a Party.

2. If under Political Code, Section 4230, the board of county commissioners has power to employ counsel (which is not decided), it has none whatever to employ counsel to prosecute a suit by an employe of the board against an officer of the county, where the county is not a party to the suit.—*Williams et al. v. Board of Commissioners of Broadwater County*, 360.

CRIMINAL LAW.

Proof of Venue—Murder.

1. In a prosecution for murder, evidence considered, and *held* to show that the crime was committed in the county alleged in the indictment.—*State v. Hardee*, 18.

Homicidal Monomania—Evidence.

2. In a prosecution for murder, evidence considered, and *held* to show too much deliberation to be the result of any sudden impulse, and to be incompatible with the theory that the defendant was afflicted with homicidal monomania.—*State v. Hardee*, 18.

New Trial--Insanity--Newly Discovered Evidence.

3. Where, in a prosecution for murder, the insanity of defendant was placed in issue, in support of which defendant called witnesses who testified, and the facts to be proved by newly discovered evidence were merely cumulative on that issue, and were not such as to make it clearly probable that a different result would follow another trial, nor was it shown that they could not have been produced on the former trial by the exercise of reasonable diligence, a new trial was properly refused.—*State v. Hardee*, 18.

Police Officer—Failure to Make Arrest—Information.

4. Laws of 1903, Chapter CXI, Section 1, declares that it shall be the duty of every policeman or other peace officer, upon being informed by a citizen that any offense is being or is about to be committed within such officer's jurisdiction, to immediately proceed to the place where the alleged offender is to be found, with the informant, if he so requests, and to arrest such offender, etc. *Held*, that an information against a policeman, alleging that he refused to proceed to the place where alleged offenders were to be found, was insufficient, the statute enjoining but one duty, which was to make an arrest, failure to perform which was the gist of the officer's offense.—*State v. King*, 268.

Conspiracy to Falsely Maintain Suit, etc.

5. Where, at the time of the making of an agreement to assign certain mining leases, options, and bonds, the assignor had made explorations along the vein, and had concluded that an adjoining mine owner was trespassing on a vein having its apex within the boundaries of the mine leased and assigned, either the assignor or the assignee might have prosecuted such alleged trespass; and hence the fact that the assignment required that the assignor should prosecute such action for the benefit of the assignee, who agreed to pay the expenses of the litigation, did not render the contract void as a conspiracy within Penal Code, Section 320, making it a misdemeanor for persons to conspire falsely to maintain any suit, etc.—*Finlen v. Heinze et al.*, 548.

Champerty.

6. Where an assignor of an interest in a mining claim retained a contingent interest in the property, his agreement, which was a part of the assignment, to prosecute a suit in his own name against an alleged trespasser for the benefit of the assignee, at the latter's expense, was not champertous.—*Finlen v. Heinze et al.*, 548.

CROSS-EXAMINATION.

Error Without Prejudice.

In view of the presumption that the court below did not consider incompetent testimony in refusing an injunction *pendente lite*, improper cross-examination of plaintiff's witnesses is not ground for reversal, no injury having been shown.—*Colusa Parrot M. & S. Co. v. Barnard*, 11.

DAMAGES.

Measure of Damages—Instruction.

1. Civil Code, Section 4330, provides that for the breach of an obligation not arising from contract the measure of damages is the amount which will

compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not. *Held*, that an instruction, in an action by an employe, that, if she was injured by defendants' negligence, she was entitled to recover what would compensate for all damage "proximately caused by the negligence of defendants, whether such damage could be anticipated or not," was not objectionable for failing to specify by whom the damage need not be anticipated, where there is no showing in the record that appellants asked for any more definite declaration upon the subject.—*Coleman v. Perry*, 1.

Eminent Domain—Streets.

2. Under Constitution. Article III, Section 14, declaring that private property shall not be taken "or damaged" for public use without just compensation, a landowner is entitled to compensation for damages owing to the grading of a street on which his property abuts, in accordance with a grade fixed by city, notwithstanding the fact that such grade is the first one ever fixed.—*Less v. City of Butte*, 27.

Nominal Damages—Instruction.

3. In a suit for the conversion of personalty, and also damages for a trespass on realty possessed by plaintiff as a tenant, it is error to instruct that the burden is on the plaintiff to show his right to the possession of "the property in controversy," since, though the leasehold was in controversy, plaintiff was—under the proofs adduced—entitled to nominal damages for the defendant's trespass thereon.—*Yoder v. Reynolds*, 183.

Nominal Damages.

4. Where a sheriff levies on personalty in defendant's warehouse, and remains in possession of the premises, defendant is entitled to nominal damages, even though no special damage is shown.—*Yoder v. Reynolds*, 183.

Carriers—Liability—Measure of Damages.

5. Where a contract for the transportation of sheep by a common carrier fixes a valuation on the sheep per head, the measure of the liability of the carrier for damages resulting from a breach of its duties causing injury to the sheep is the amount of the actual damage not exceeding the stipulated valuation per head.—*Nelson v. Great Northern Ry. Co.*, 297.

Double Damages—Instruction.

6. For an instruction held to be erroneous as allowing double damages, see *Nelson v. Great Northern Ry. Co.*, 297.

DOWER.

Rights of Widow—Heir of Husband—Dower.

1. The wife's right to dower or election under Sections 228 and 236 (Civil Code), are separate from her rights as an heir of her husband under Section 1852, and hence the fact that she participated in the distribution of the estate as an heir of her husband does not constitute a waiver of the right of election to take one-half of the residue after payment of debts, under Section 236.—*Dahlman v. Dahlman et al.*, 373.

Probate—Jurisdiction of Court—Dower.

2. When a court is exercising its probate jurisdiction, it has no power with reference to dower, and can make no orders affecting a widow's dower right.—*In re Dahlgren's Estate*, 379.

DURESS.

Promissory Note—Evidence.

1. Evidence considered, and held insufficient to sustain a jury finding that the note sued on was executed under duress.—*Bullard v. Smith*, 387.

Promissory Note—Burden of Proof.

2. In an action on a note, the burden of proving duress is on defendant.—*Bullard v. Smith*, 387.

EASEMENTS.

Air—Light—Access.

The owner of a city lot has an easement in the public street for the purpose of giving to such land facilities of light, of air, and of access from such street.—*Less v. City of Butte*, 27.

EMINENT DOMAIN.

See CONSTITUTION, 1, 2.

EQUITY.

Instructions—Appeal—Review.

1. On appeal in a suit in equity, alleged error in instructions cannot be considered; the verdict being merely advisory.—*King v. Pony Gold Mining Co.*, 74.

Admission of Incompetent Evidence—Presumption.

2. Admission of incompetent evidence in an equity case is not reversible error, it being presumed that the court considered competent evidence only, except where it clearly appears from the record that the court actually considered the incompetent evidence in making up its findings, or where the record—containing all the evidence—does not disclose sufficient competent evidence to warrant the findings.—*King v. Pony Gold Mining Co.*, 74.

Warranty Deed—Equitable Mortgage—Equitable Relief.

3. A grantor cannot maintain a suit in equity for the sole purpose of having a deed absolute on its face declared a mortgage, but must also offer to redeem the property, and place himself wholly within the jurisdiction of the court to settle the whole controversy between him and his grantee.—*Mack v. Hill*, 99.

Instructions in Chancery Case.

4. Since a suit to foreclose a mechanic's lien is a proceeding in chancery, the jury's findings are only advisory, and error in instructing them is not reviewable.—*Cook et al. v. Gallatin Railroad Co. et al.*, 340.

ESTOPPEL.

See APPEAL, 31.

EVIDENCE.

Expert Evidence.

1. Whether a laundry mangle is defective is a proper subject for expert evidence.—*Coleman v. Perry*, 1.

Issues—Stipulation—Inadmissible Evidence.

2. In an action to enjoin defendants from diverting certain waters claimed by plaintiffs for irrigation purposes, the parties stipulated that no question should be made as to the titles of the respective parties to the lands described in the pleadings, and in connection with which the water claimed by each was to be used. *Held*, that evidence that defendants' premises were located upon an Indian reservation, which they could not lawfully occupy, was inadmissible.—*Phillips v. Coburn*, 45.

Water Rights—Priority of Appropriation.

3. In an action involving the priority of appropriations of certain water rights plaintiffs contended that the appropriation made by their predecessor in interest was made in July of a certain year, and the court found that the appropriation was made in October of that year. *Held* that, notwithstanding this finding, evidence of declarations made by plaintiffs' predecessor in interest, tending to show that in August of the year in question they had made no appropriation, was admissible under Code of Civil Procedure, Section 3125.—*Phillips v. Coburn*, 45.

Pleadings in Other Suits.

4. Where, in an action for money loaned, defendant claimed that plaintiff and C. were partners, and that the money was loaned by plaintiff to be used in their business, and thereafter the notes of a third person who conducted the business for the firm were received by plaintiff in settlement of the advancement, a verified complaint in an action by defendant against the wife of such manager, in which defendant claimed to be the owner of such business, was admissible.—*Tague v. John Caplice Co.*, 51.

Action for Money Loaned—Defense—Notes Taken in Payment of the Debt.

5. Where, in an action for money loaned, there was no evidence that plaintiff had any knowledge that defendant intended to loan the money to N., or that plaintiff had agreed to accept N.'s notes in payment of the loan to defendant, the notes executed by N., some of which were made payable to defendant, and some to plaintiff by direction of defendant's trustees, without authority from plaintiff, were inadmissible.—*Tague v. John Caplice Co.*, 51.

Chattel Mortgage—Hearsay.

6. Testimony, by a mortgagee of personalty, that the one who it was claimed had purchased it told him that the owners said the sale could be made if he, the mortgagee, was willing, was inadmissible as hearsay.—*Reynolds v. Fitzpatrick et al.*, 170.

Testimony of Absent Witness—Preliminary Proof.

7. To warrant the introduction of the testimony of an absent witness, given upon a former trial, the party seeking to introduce such testimony must preliminarily prove the fact of departure or absence of such witness by positive testimony, or by the existence of circumstances from which departure or absence can be reasonably inferred.—*Reynolds v. Fitzpatrick et al.*, 170.

Testimony of Absent Witness—Preliminary Proof.

8. A party offering the testimony of a witness on a former trial showed that a subpoena was issued, which was returned with the sheriff's indorsement that he could not find the witness, and the party testified that he heard that the witness lived at a certain place, and he had written his (the party's) daughter about it, who said she had not heard of him in two years; that he inquired of a man in another place, who said that the witness had gone to the Klondike, and inquired of other parties, who said they did not know where he was. *Held* error to admit the testimony on the former trial, as the proof failed to show that the witness was out of the state, or, if so, it did not show that he might not have started a few days before trial.—*Reynolds v. Fitzpatrick et al.*, 170.

Testimony of Absent Witness—Preliminary Proof—Hearsay.

9. Testimony that a third person told plaintiff, who was seeking to introduce the testimony of a witness given at a former trial, that said witness had gone to the Klondike, was hearsay.—*Reynolds v. Fitzpatrick et al.*, 170.

Testimony of Absent Witness—Preliminary Proof.

10. On a motion to introduce the testimony of a witness given on a former trial, the stenographer who officiated at the former trial was sworn, but did not testify that the transcript presented was a correct copy of the testimony as actually given. *Held* error to admit the testimony. *Quære*: Whether the testimony of a witness given at a former trial can be proven by the notes of the official stenographer who took it, or by a transcript of such notes?—*Reynolds v. Fitzpatrick et al.*, 170.

Conversion of Mortgaged Property—Title in Third Person.

11. In an action for conversion, plaintiff did not claim to be the owner of the property converted, but claimed the right to the immediate possession thereof by reason of an alleged default in the terms of a verbal, mortgage claimed by him to cover the property. *Held* error to exclude testimony that, prior to any assertion by plaintiff of his rights under the mortgage, the mortgagor, who then had possession of the property, had sold the same to a third person, who had no notice of plaintiff's rights, as this evidence tended to show title in the third person, and therefore to defeat the action.—*Reynolds v. Fitzpatrick et al.*, 170.

Good Will of Business—Value.

12. Civil Code, Section 1372, provides that the good will of a business is property, transferable like any other. A debtor transferred his stock of goods by an itemized bill of sale, which did not include the good will of the business. *Held*, on an issue of fraud towards creditors in the conveyance, that evidence as to the value of the good will was inadmissible.—*Yoder v. Reynolds*, 183.

General Objection.

13. Where a question asked a witness calls for evidence which is wholly inadmissible for any purpose, it is not error for the court to sustain a mere general objection to it.—*Yoder v. Reynolds*, 183.

General Objection.

14. Where an offer of testimony includes that which is admissible with that which is not, and the competent and incompetent are blended together, it is not error for the court to sustain a mere general objection to its admission.—*Yoder v. Reynolds*, 183.

Objection—Waiver.

15. A party who permits incompetent testimony to go in without objection waives his right to object, and cannot move to strike it out.—*Yoder v. Reynolds*, 183.

Incompetent Evidence—Motion to Strike Out.

16. Where testimony is offered which may be competent upon the showing made, and therefore no objection is made to it, and its incompetency is afterwards developed; or when incompetent testimony is volunteered by a witness in response to a proper question, such testimony should be stricken out on motion.—*Yoder v. Reynolds*, 183.

Mining Claim—Location Notice.

17. Since the legislature has the right to provide rules for the marking of the boundaries of mining claims; for a record of such location; and what the recorded paper must contain,—the court may rightly exclude a location notice which fails to conform to the statute.—*Baker v. Butte City Water Co.*, 222.

Carriers—Transportation of Live Stock.

18. In tort against a common carrier for delay in the transportation of sheep the shipper could show the condition of the sheep at the time of their shipment, and, whether evidence of the treatment and food received by the sheep immediately prior to the shipment was a correct way to show this condition or not, defendant was not prejudiced by such evidence, admitted without objection, where the court charged the jury not to consider any damages sustained prior to the loading of the sheep on the carrier's cars.—*Nelson v. Great Northern Ry. Co.*, 297.

Fraudulent Chattel Mortgage.

19. Where it was claimed that a chattel mortgage was void as to subsequent purchasers of the goods mortgaged, by reason of the fact that the mortgagor was permitted to remain in possession and sell the goods without accounting to the mortgagee, extrinsic evidence was admissible to show the conditions actually existing and the conduct of the parties with reference to the mortgaged property.—*Stevens et al. v. Curran et al.*, 366.

Extrajudicial Declarations.

20. Extrajudicial declarations, not under oath, corroborating testimony given in court, cannot be received.—*Farleigh v. Kelley*, 421.

Incompetent Evidence—Exclusion.

21. Where evidence is offered as a whole, and part of it is incompetent, the exclusion of all of it is not error.—*Farleigh v. Kelley*, 421.

EXECUTORS AND ADMINISTRATORS.

Claims Against Estate—Time for Presentment.

Under the direct provisions of Code of Civil Procedure, Section 2603, all claims against the estate of a decedent must be presented within the time limited in the administrator's notice to creditors, or they are barred forever, except when it appears by the affidavit of the claimant, to the satisfaction of the court, that he had no notice, by reason of being out of the state.—*Melton v. Martin*, 150.

EXEMPTIONS.

Gold Dust from Miner's Placer Claim.

Section 1222 (Subdivision 7), Code of Civil Procedure, exempts to a placer miner the gold dust taken from his claim by his own labor within thirty days next preceding a levy of execution or attachment, when he is a poor man whose family resides in the state and depends for support upon his personal labor in working his mine, and the debt is not for the common necessities of life.—*Dayton v. Ewart*, 153.

FINDINGS.

Appeal—Insufficiency of Evidence—Specifications.

1. Where the specifications of particulars wherein the evidence is alleged to be insufficient to support the findings do not meet the requirements of Section 1173, Code of Civil Procedure, they will be disregarded.—*Phillips v. Coburn*, 45.

Appeal—Conflicting Evidence.

2. Where the evidence is conflicting, findings of fact of the district court are conclusive on appeal.—*Phillips v. Coburn*, 45.

Correction by Trial Court.

3. It is not error for the trial court, at the time it heard and determined a motion for a new trial, on discovery that it had inadvertently and through obvious mistake made an error in favor of plaintiff in a conclusion of law, to amend the same with plaintiff's consent.—*Merrill v. Miller*, 134.

Appeal—Implied Finding—Record on Appeal—Preservation of Evidence—Review.

4. In an action tried to the court, defendants denied all the allegations of the complaint and specially pleaded the statute of limitations. On appeal by plaintiff from the judgment, the only assigned error was that "the court erred in giving judgment against appellant, for in so doing he evidently held the statute of limitations had run against the action." Held, that as there was nothing in the record disclosing the reason why the court found and entered judgment in favor of defendants, it would be presumed—under

the doctrine of implied findings—that the court found that the plaintiff failed to make out a *prima facie* case on the merits, hence, the evidence not being in the record, the judgment must be affirmed.—*Boe v. Hawes et al.*, 201.

Appeal—Conflicting Evidence.

5. Findings of fact by a trial court, based on conflicting evidence, will not be disturbed on appeal.—*Stevens et al. v. Curran et al.*, 366.

Appeal—Evidence—Presumption.

6. Where, in an action tried to the court, the evidence admitted without objection was sufficient to sustain the court's findings, it will be presumed on appeal that evidence erroneously admitted was not considered by the court in arriving at its conclusion.—*Finlen v. Heinze et al.*, 548.

FRAUDULENT CONVEYANCES.

Good Will of Business—Evidence of Value.

1. Civil Code, Section 1372, provides that the good will of a business is property, transferable like any other. A debtor transferred his stock of goods by an itemized bill of sale, which did not include the good will of the business. *Held*, on an issue of fraud towards creditors in the conveyance, that evidence as to the value of the good will was admissible.—*Yoder v. Reynolds*, 183.

Bona Fide Purchaser—Instruction.

2. On an issue of fraud towards creditors in a debtor's conveyance, the court instructed that if a prior transfer from his partner to the debtor was made without consideration or secretly, or for any fraudulent purpose, or to allow the debtor to make the transfer in question with intent to defraud creditors of the partnership, then the conveyance in issue would be invalid. *Held* error, as permitting the conveyance to be invalidated though the grantee was an innocent purchaser for value.—*Yoder v. Reynolds*, 183.

Bona Fide Purchaser—Instruction.

3. The court further instructed that if the grantee was not at the time of the conveyance the legal or real owner of notes given by the debtor, the cancellation of which was the consideration for the conveyance, but the facts concerning the true ownership were concealed for the purpose of defeating partnership creditors, the conveyance would be void. It appeared that the notes were signed by the grantee, and given to a payee who afterwards became his wife. *Held*, that both instructions were, as a whole, erroneous, as telling the jury, in effect, that the grantee did not have the right to secure himself by purchasing the property in good faith, even though he was liable on the notes.

The latter instruction was also erroneous, as it was immaterial to the creditors of the partnership whether the ownership of the notes was in the grantee or his wife.—*Yoder v. Reynolds*, 183.

Bona Fide Purchaser—Instruction.

4. The court instructed that if the prior transfer to the debtor from his partner was not made for value in good faith, and was not disclosed to creditors, then it would not vest the title in the debtor alone, but, if the

partnership or the debtor continued to carry on the business under the partnership name, then the conveyance would be void towards creditors of the firm. *Held* error, as whether the transfer between the partners was fraudulent or not, it gave to the debtor the legal title, so as to enable him to give an absolutely good title to a *bona fide* purchaser.—*Yoder v. Reynolds*, 183.

GARNISHMENT.

Payment Into Court by Garnishee.

Where a garnishee paid into court, in answer to garnishment served upon her, the full amount of her indebtedness to the defendant in the proceedings, the judgment recovered therein against him operated to fully discharge the garnishee's indebtedness.—*Taney v. Vollenweider*, 147.

HOMICIDE.

See CRIMINAL LAW.

INJUNCTION.

Injunction *Pendente Lite*—Refusal—Appeal.

1. Upon an appeal from an order refusing an injunction *pendente lite*, the principal question for consideration is whether, upon the evidence introduced at the hearing, the court below manifestly abused its discretion in refusing the injunction.—*Colusa Parrot M. & S. Co. v. Barnard*, 11.

Injunction *Pendente Lite*—Admission of Incompetent Evidence—Presumption.

2. An admission of incompetent evidence on the hearing of a motion for an injunction *pendente lite* is not ground for reversal in view of the presumption that the court acted only on the competent evidence adduced.—*Colusa Parrot M. & S. Co. v. Barnard*, 11.

Injunction *Pendente Lite*—Cross-Examination—Presumptions.

3. In view of the presumption that the court below did not consider incompetent testimony in refusing an injunction *pendente lite*, improper cross-examination of plaintiff's witnesses is not ground for reversal, no injury having been shown.—*Colusa Parrot M. & S. Co. v. Barnard*, 11.

Injunction *Pendente Lite*—Refusal—Costs.

4. An allowance to defendant, on the refusal of a motion for an injunction *pendente lite*, of "all costs," is erroneous.—*Colusa Parrot M. & S. Co. v. Barnard*, 11.

Sufficiency of Evidence.

5. Evidence sufficient to authorize a preliminary injunction or its refusal, is not necessarily sufficient to maintain a like decision upon the final trial on the merits.—*Colusa Parrot M. & S. Co. v. Barnard*, 11.

Supreme Court—Original Jurisdiction.

6. The supreme court will not entertain an original proceeding to test, by an injunction to restrain the state text-book commission from advertising for bids, the constitutionality of a statute relating to a uniform system of

text-books, and requiring the books contracted for to bear "union labels;" no pressing necessity appearing for a speedy determination of the question, the court calendar being three years in arrears, and the matter being one which should ordinarily, and in the first instance, be submitted to the district court; especially where it is apparent that the interests of the public, so far as they are involved, may be as well protected if the parties are left to pursue the usual course.—*Snell v. Welch*, 37.

Mining Claims—Location—Necessity of Discovery—Trespass.

7. Rev. St. U. S. Section 2320 (U. S. Comp. St. 1901, p. 1424), relating to the location of mining claims on public lands of the United States, provides that no location shall be made until the discovery of the vein or lode within the limits of the claim located. *Held*, that one who had entered on a vacant 20-acre tract, and had begun prospecting shafts, but had made no discovery, could not enjoin a trespass on the tract; he not alleging that the trespass was upon the ground surrounding his shafts, and of which he was in the actual occupancy.

The fact that he had posted notices of location would not enlarge his rights. The fact that the trespassers had enjoined him from continuing work, and he had secured a reversal of the decree, was immaterial.—*Gemmell v. Swain et al.*, 331.

INSTRUCTIONS.

As to measure of damages, see DAMAGES, 1.

As to review on appeal, see APPEAL, 30.

As to *bona fide* purchasers, see FRAUDULENT CONVEYANCES, 2, 3, 4.

As to erroneous instruction in a suit for the conversion of personalty and also damages for a trespass on realty, see DAMAGES, 3.

As to liability of carrier for delay in transportation of live stock, see CARRIERS, 8, 11.

As to instructions in chancery case, see EQUITY, 4.

As to instructions in action on a *quantum meruit*, see ASSUMPSIT, 7.

General Rules Applicable to Instructions.

1. Instructions must be warranted by the pleadings and evidence.
2. Instructions should not be argumentative in form.
3. It is error for the court in an instruction to comment on the weight to be given the evidence of the parties to the action.
4. It is error for the court to give conflicting instructions.
5. It is error for the court in an instruction to incorrectly state the initials of a party's name.
6. A court, in its instructions, should be brief and clear, it should not indulge in needless repetition and legal verblage, nor should it attempt to give all the law extant upon the subject under consideration.—*Yoder v. Reynolds*, 183.
7. The giving of an instruction having no foundation in the evidence is error.—*Bullard v. Smith*, 387.
8. An erroneous instruction is presumed to be prejudicial.—*Lawrence v. Westlake*, 503.
9. It is error for the court in an instruction to assume the existence of disputed facts.—*Lawrence v. Westlake*, 503.
10. It is error for the court to charge that in a certain civil case less strictness of proof is required than in other civil cases.—*Lawrence v. Westlake*, 503.

INTERSTATE COMMERCE.

Taxation—Foreign Insurance Companies.

Section 681 of the Civil Code, applying, as it does, only to business transacted within the state, is not objectionable as interfering with interstate commerce.—*Northwestern Mutual Life Ins. Co. v. Lewis and Clarke County*, 484.

INTERVENTION.

See *MECHANICS' LIENS*, 10, 11.

JUDGES.

Disqualification—Bias or Prejudice.

1. The Act of the Eighth legislative assembly, entitled "An Act to provide for the designation and appointment of a district judge to temporarily hold court in another district than his own, and to perform the official duties of the district judge of such district, where such judge is biased or prejudiced or for any cause disqualified from performing the same" Laws of 1903, Chapter 42), held to be unconstitutional.—*In re Weston*, 207.

Disqualification—Bias or Prejudice.

2. In the absence of a statute declaring bias or prejudice on the part of a judge to be a disqualification, bias or prejudice does not constitute a disqualification.—*In re Weston*, 207.

Misconduct—New Trial.

3. Where an action was tried to the court, and a female employe of one of the successful defendants had communications with the judge, and wrote letters to him, to which he replied, soliciting further conversation with relation to the case while the same was being argued before him, and such letters containing reference to benefits to be derived by the judge in case of a decision favorable to the writer's employer, and the judge, in an affidavit submitted, failed to deny the authorship of the reply, such acts entitled plaintiff to a new trial.—*Finlen v. Heinze et al.*, 548.

Misconduct—New Trial.

4. Affidavits, not explained away, casting grave suspicion upon the integrity of a court's decision, is ground for a new trial, without reference to the merits of the case.—*Finlen v. Heinze et al.*, 548.

JUDGMENTS.

Minute Entry Directing Judgment.

1. A minute entry directing judgment to be entered for defendant is not a judgment.—*Lisker v. O'Rourke*, 129.

Statute Changing the Rate of Interest.

2. Civil Code, Section 2588, provides that a judgment shall bear interest at the rate of 10 per cent. per annum. Laws of 1899, p. 116, amends Section 2588 so as to reduce the interest to 8 per cent., repeals all acts in conflict with it, and provides that it shall take effect from and after its approval. Held, that a judgment rendered prior to the date when the

amendment went into effect bore 10 per cent. interest until that date, and only 8 per cent. thereafter.—*Stanford v. Coram*, 288.

Constitution—Contract.

3. A judgment is in the nature of a contract, but is not a contract within the meaning of Section 10, Art. I, of the Constitution of the United States, and Section 11, Art. III, of the Constitution of Montana.—*Stanford v. Coram*, 288.

Claim and Delivery—Appeal.

4. Where, in an action in claim and delivery, the judgment contains a description of the property different from that found in either the complaint or the verdict, the judgment will, on appeal, be reversed.—*Conley v. Dunn*, 295.

Judgment by Consent.

5. Judgment entered on the stipulation of the parties is in fact a judgment by consent.—*Corby v. Abbott*, 523.

Modification of Decree—Jurisdiction.

6. Where, in an action to recover an interest in a mining claim, a court entered a decree granting specific performance of an alleged agreement to convey plaintiff's interest to one of the defendants, it had no jurisdiction to subsequently modify such decree by adding a paragraph retaining jurisdiction with reference to the granting of an injunction restraining the operation of the mine.—*Finlen v. Heinze et al.*, 548.

JURISDICTION.

Patents—Suit for Conveyance.

1. A suit to obtain a conveyance of an alleged interest in an invention, to enjoin defendant from disposing of plaintiff's interest therein, and to compel defendant to account for sums received by him for a sale to a third party of an interest therein—the sole issue being whether defendant had sold an interest in the machine to plaintiff—was not a suit arising under the patent laws, and the state court had jurisdiction thereof.—*Merrill v. Miller*, 134.

Probate—Dower.

2. When a court is exercising its probate jurisdiction, it has no power with reference to dower, and can make no orders affecting a widow's dower right.—*In re Dahlman's Estate*, 379.

JURY.

Question for Jury.

The question whether the danger of operating a particular laundry mangle is so obvious that an inexperienced employe could not fail to notice and avoid it in exercising ordinary care, is for the jury.—*Coleman v. Perry*, 1.

JUSTICE OF THE PEACE.

Change of Venue—Costs.

Where defendant, on being granted a change of venue, refused to pay the accrued costs as provided by Code of Civil Procedure, Section 1484, it was

the duty of the justice of the peace to proceed with the trial.—*Taney v. Vollenweider*, 147.

LIS PENDENS.

Purpose.

The purpose of *lis pendens* is to bind any subsequent purchasers, by the decree obtained in the action, to the same extent as though actually parties to the litigation.—*Wetzstein v. Boston & Montana C. C. & S. Mining Co.*, 451.

MASTER AND SERVANT.

Assumption of Risk.

The doctrine of assumption of risk has no application to a case where an inexperienced laundry employe is directed to feed a mangle, the work requiring experience, and the employe receiving no instruction, notice, or warning of defects.—*Coleman v. Perry*, 1.

MECHANICS' LIENS.

Building Contract—Final Payment—Architect's Certificate.

1. A building contract provided that all payments should be made on the certificate of the architect that payments had become due, and that final payment should be due when the work was completed and accepted. *Held*, that presentation of a certificate of the architect was a condition precedent to final payment.—*McGlaulin v. Wormser*, 177.

Complaint—Sufficiency.

2. A complaint in an action to enforce a mechanic's lien must state that the necessary architect's certificate was given or demanded, and, if refused, the reasons why it should have been given, or, if waived, a statement of that fact.—*McGlaulin v. Wormser*, 177.

Complaint—Sufficiency.

3. Code of Civil Procedure, Section 2131, relative to mechanics' liens, provides the statutory steps which must be taken for its assertion. *Held*, that, in an action to enforce a mechanic's lien, allegations showing compliance with Section 2131 are jurisdictional, and when denied must be proven as alleged, in order to authorize decree of foreclosure.—*McGlaulin v. Wormser*, 177.

Lien—Proof—Appeal.

4. Where, in a suit to enforce a mechanic's lien, no proof is made showing the existence of any lien, questions raised on appeal as to the extent or validity of the lien are not open to consideration.—*McGlaulin v. Wormser*, 177.

Foreclosure—Amended Complaint—Demurrer.

5. The refusal to permit defendants to demur to a complaint amended after the jury is sworn is not ground for reversal, where no ground for the demurrer was stated, nor any written demurrer offered, and the complaint seems to have stated a cause of action.—*Cook et al. v. Gallatin Railroad Co. et al.*, 340.

Foreclosure—Engineer's Final Estimate—Impeachment.

6. Though, in a mechanic's lien foreclosure, plaintiffs declare on a contract under which a settlement was to be had on a final estimate of defendants' superintendent of construction, and defendants deny that plaintiffs have complied with the contract, yet, where both parties on the trial seek to impeach the superintendent's estimate, the defendants cannot complain that the admission of plaintiffs' evidence of its inaccuracy was error.—*Cook et al. v. Gallatin Railroad Co. et al.*, 340.

Foreclosure—Engineer's Final Estimate—Impeachment.

7. Where defendants in a mechanic's lien foreclosure themselves seek to impeach their superintendent's estimate of the work, the admission of hearsay evidence of his statements that his estimate was erroneous is harmless error.—*Cook et al. v. Gallatin Railroad Co. et al.*, 340.

Foreclosure—Evidence—Admissibility.

8. In a mechanic's lien foreclosure, a witness' testimony that a certain person made calculations as to the amount of work done, and dictated them to him, is insufficient to warrant the introduction of such estimates.—*Cook et al. v. Gallatin Railroad Co. et al.*, 340.

Foreclosure—Jury—Instructions.

9. Since a suit to foreclose a mechanic's lien is a proceeding in chancery, the jury's findings are only advisory, and error in instructing them is not reviewable.—*Cook et al. v. Gallatin Railroad Co. et al.*, 340.

Foreclosure—Intervention—Owner's Name.

10. Under Code of Civil Procedure, Section 2131, requiring notice of a mechanic's lien to be filed in the county clerk's office, and Section 2132, requiring that the clerk's abstract shall contain the name of the person against whose property the lien is filed, the filing of notice of a lien upon the property of the Yellowstone Park Railway Company and the Yellowstone Park Railroad Company will not warrant intervention in a mechanic's lien foreclosure against the Gallatin Railroad Company, though the complaint in intervention alleges, on information and belief, that the corporations are substantially the same.—*Cook et al. v. Gallatin Railroad Co. et al.*, 340.

Foreclosure—Intervention—Claim for Money.

11. Merely a money demand against a defendant in a mechanic's lien foreclosure will not warrant intervention therein, though plaintiffs consent thereto.—*Cook et al. v. Gallatin Railroad Co. et al.*, 340.

MINES AND MINING.

Location Notice—Evidence.

1. Since the legislature has the right to provide rules for the marking of the boundaries of mining claims; for a record of such location; and what the recorded paper must contain,—the court may rightly exclude a location notice which fails to conform to the statute.—*Baker v. Butte City Water Co.*, 222.

Location—Necessity of Discovery—Injunction.

2. Rev. St. U. S. Section 2320 (U. S. Comp. St. 1901, p. 1424), relating to the location of mining claims on public lands of the United States, provides that no location shall be made until the discovery of the vein or lode within the limits of the claim located. *Held*, that one who had entered on a vacant 20-acre tract, and had begun prospecting shafts, but had made no discovery, could not enjoin a trespass on the tract; he not alleging that the trespass was upon the ground surrounding his shafts, and of which he was in the actual occupancy.

The fact that he had posted notices of location would not enlarge his rights, The fact that the trespassers had enjoined him from continuing work, and he had secured a reversal of the decree, was immaterial.—*Gemmell v. Sicaia et al.*, 331.

Mining Property—Sale—Optional Contracts—Rescission—Refunding Payments.

3. Defendant gave plaintiff an exclusive option on certain mining property and placed him in possession. An installment becoming due, plaintiff expressed dissatisfaction, and requested an extension of thirty days on the installment, which was refused, and demand made for adherence to the contract. Defendant insisted on the contract, and indicated no intention of abandoning it. After telegraphic communications relating to the transaction, defendant demanded the deeds which had been placed in escrow; and received from plaintiff possession of the properties, terminating the contract. Plaintiff claimed a return of installments previously paid, on the ground that defendant had abandoned the contract, which contained no provision relative to the retention of installments, and of which time was the essence. *Held*, that plaintiff was not entitled to a return of the installments, as it did not affirmatively appear, from the contract of sale or in the agreement to rescind, that the purchaser was to have payments made refunded.—*Clark v. American Developing & Mining Co.*, 468.

Mining Claim—Extralateral Rights.

4. When the possession of the surface of a mining claim and the apex of the vein found therein is shown, with the other facts establishing the right to pursue the vein on its dip, the presumption in favor of the owner of neighboring surface—arising from the doctrine "*cujus est solum, ejus est ad inferos*"—is overturned and disappears.—*State ex rel. Parrot S. & C. Co. v. District Court*, 528.

Inspection and Survey.

5. Under Code of Civil Procedure, Section 1314, the filing of a petition is not required; a motion sufficient to move the discretion of the court is all that is required.—*State ex rel. Parrot S. & C. Co. v. District Court*, 528.

Inspection and Survey.

6. Where it is made to appear from the allegations of the petition, either alone or by reference to the complaint, that there is good cause to believe that an examination of the property will aid the parties in the presentation of their case, and such allegations are supported by substantial evidence, it is sufficient to warrant the making of a proper order under Section 1314, Code of Civil Procedure.—*State ex rel. Parrot S. & C. Co. v. District Court*, 528.

Inspection and Survey.

7. If a stranger, under claim of title, encroaches upon the exterior por-

tions of a lode by means of openings of which he has the exclusive control, Section 1314, Code of Civil Procedure, grants the owner of such exterior portions entry through, and a proper inspection and survey of, such underground workings of his adversary as are necessary to the ascertainment of the facts necessary to enable the owner to protect his rights.—*State ex rel. Parrot S. & C. Co. v. District Court*, 528.

Inspection and Survey.

8. Where the issues do not render necessary an examination of all of defendant's workings, an order under Section 1314, Code of Civil Procedure, authorizing the plaintiffs to survey all the underground workings in the entire group of defendant's claims, is erroneous.—*State ex rel. Parrot S. & C. Co. v. District Court*, 528.

Inspection and Survey.

9. Where, in an action to determine the extralateral rights of the owner of lode mining property, it appeared that most of the workings in one of defendant's claims could be readily reached through plaintiffs' shaft, it was error for the court, in granting an order of inspection and survey under Section 1314, Code of Civil Procedure, to allow the plaintiffs access to defendant's workings exclusively through defendant's shafts, and by means of the latter's appliances.—*State ex rel. Parrot S. & C. Co. v. District Court*, 528.

Inspection and Survey.

10. Under Section 1314, Code of Civil Procedure, it was error to allow an inspection of defendant's workings, requiring defendant to use its appliances to lower and raise plaintiffs' agents in making such inspection, without providing for the payment by plaintiffs of the expenses incident thereto upon the presentation of a claim therefor by the defendant.—*State ex rel. Parrot S. & C. Co. v. District Court*, 528.

Inspection and Survey.

11. Where the evidence indicates conditions to justify a well-grounded belief that the adverse party is trespassing upon applicant's rights, the order, under Section 1314, Code of Civil Procedure, should be made.—*State ex rel. Parrot S. & C. Co. v. District Court*, 528.

MORTGAGES.

Statute of Limitations.

1. A note secured by mortgage fell due June 11, 1886, and by the statute in force at that time action thereon would be outlawed in six years. Act 1880 (Sess. Laws 1889, p. 172) extended the period within which actions might be brought on written instruments to eight years, but expressly provided that the Act should not affect causes of action accrued prior to its passage. Code of Civil Procedure, Section 557, provides that the limitations prescribed therein shall not apply to causes of action which have become barred by existing statutes. *Held*, that the Act of 1880 and the limitations prescribed in the Code had no application to the note in suit, but it was governed by the law in force at its maturity.—*Wilson v. Pickering*, 435.

Renewal of Note.

2. Civil Code, Section 3842, providing that a mortgage can be created, renewed or extended only by writing with the formalities required in the case of a grant of real property, since it did not take effect until July 1, 1895, and since by Section 4651 no part of the Civil Code is retroactive unless expressly so declared, has no application to a mortgage renewed by extension of the note which it secured in 1890.—*Wilson v. Pickering*, 435.

Renewal of Note—Discharge of Mortgage.

3. A mortgage secures a debt, and not the evidence thereof, and no change in the form of the evidence or renewal thereof can operate to discharge the mortgage, in the absence of an express agreement or a plain manifestation of intention that it shall do so.—*Wilson v. Pickering*, 435.

Renewal of Note—Burden of Proof.

4. The maker of a note secured by a mortgage, who renews the note, has the burden of proving that it was the intention of the parties that such renewal should not extend the mortgage.—*Wilson v. Pickering*, 435.

Renewal of Note—Extension of Mortgage—Presumption.

5. The maker of a note executed a mortgage to secure it. After maturity of the note, it was renewed. After the maturity of the renewal note, it was again renewed, and a mortgage was given by the maker on other land than that covered in the first mortgage. The maker, at the time of executing the second mortgage, was requested to execute a new mortgage covering the property described in the first, but this he declined to do, requesting, however, that the mortgagor bring suit to foreclose the first mortgage. *Held*, insufficient to overcome, as a matter of law, the presumption that the renewal of the note extended the first mortgage.—*Wilson v. Pickering*, 435.

MUNICIPAL CORPORATIONS.

Streets—Eminent Domain.

Under Constitution, Article III, Section 14, declaring that private property shall not be taken "or damaged" for public use without just compensation, a landowner is entitled to compensation for damages owing to the grading of a street on which his property abuts, in accordance with a grade fixed by city, notwithstanding the fact that such grade is the first one ever fixed.—*Less v. City of Butte*, 27.

NEGLIGENCE.

See CARRIERS.

Contributory Negligence—Pleading—Failure to Reply.

Under Code of Civil Procedure, Section 720, requiring a reply only when the answer contains a counterclaim, failure to reply in a personal injury case does not admit allegations of contributory negligence.—*Coleman v. Perry*, 1.

NEW TRIAL.

Irregularity or Abuse of Discretion—Review on Appeal.

1. Code of Civil Procedure, Section 1171, Subdivision 1, authorizes a new trial for any irregularity or abuse of discretion preventing a fair trial.

Section 1172 requires that when application is made for such a cause it must be upon affidavits. *Held* that the failure to show by affidavit an alleged error of the court in commenting on the probable effect of evidence at the time of its reception precludes its review on appeal.—*Coleman v. Perry*, 1.

Murder—Insanity—Newly Discovered Evidence.

2. Where, in a prosecution for murder, the insanity of defendant was placed in issue, in support of which defendant called witnesses who testified, and the facts to be proved by newly discovered evidence were merely cumulative on that issue, and were not such as to make it clearly probable that a different result would follow another trial, nor was it shown that they could not have been produced on the former trial by the exercise of reasonable diligence, a new trial was properly refused.—*State v. Hardee*, 18.

Order Granting a New Trial—Appeal—Stipulation—Reversal.

3. Where, after an appeal from an order granting a new trial, the parties, in pursuance of a settlement which they have reached, file a stipulation requesting a reversal of the order, that disposition of the case will be made (when there is no question as to the district court's jurisdiction in the case), though it is not apparent that, upon an examination of the record, affirmance might not be proper.—*Mantle v. Largey*, 38.

Irregularity or Abuse of Discretion—Review on Appeal.

4. Under Code of Civil Procedure, Section 1172, providing that when an application for a new trial is made for irregularity in the proceedings of the court, or for an abuse of discretion, it must be made on affidavits, an alleged error, consisting in the use of certain language by the court in the presence of the jury during the trial, cannot be reviewed, where the error is not preserved and brought into the record by affidavit.—*Tague v. John Caplice Co.*, 51.

Irregularity or Abuse of Discretion—Record on Appeal.

5. Under Code of Civil Procedure, Section 1172, providing that, when a motion for a new trial is based on error in the exercise of the trial court's discretion the motion must be made on affidavits, alleged error in striking certain attorneys' names from the answer cannot be considered on appeal where the record contains no affidavits.—*King v. Pony Gold Mining Co.* 74.

Statutory Provisions—Noncompliance—Effect.

6. Since a motion for a new trial is a statutory remedy, in order to successfully invoke it, the mode pointed out by the statute must be pursued.—*State ex rel. Stromberg-Mullins Co. v. District Court*, 123.

Statement—Settlement—Loss of Right.

7. Under Code of Civil Procedure, Section 1173, Subdivision 3, providing that, where amendments to a statement of the case for a new trial are not adopted, the proposed statements and amendments shall be presented to the judge by the movant within ten days, on five days' notice to the adverse party, or delivered to the clerk for the judge, where movant notified his adversary that the statement would be presented to the judge for settlement at a certain time, and at the time appointed failed to appear, and did not present the statement to the judge or leave it with the clerk, or then and there adopt the amendments of the adverse party, it lost its right to

have the statement settled at all. The right could not be revived by a subsequent adoption of the adverse party's amendments.—*State ex rel. Stromberg-Mullins Co. v. District Court*, 123.

Statement—Amendments—Acceptance—Notice.

8. A motion filed with the clerk for the settlement of a statement on motion for new trial, reciting the acceptance of the adverse party's amendments to the statement, but not called to such adverse party's attention, is not notice to him of such acceptance.—*State ex rel. Stromberg-Mullins Co. v. District Court*, 123.

Statement—Settlement.

9. Under the provisions of the Code of Civil Procedure, it is the duty of the judge to settle statements and bills of exceptions, and for this purpose they must be presented to him, and not to the court as such. *Quære*: Whether in a proceeding for a writ of *mandamus* to compel a district judge to settle a statement it is proper practice to make the court a party to the proceeding?—*State ex rel. Stromberg-Mullins Co. v. District Court*, 123.

Motion for New Trial.

10. A motion for a new trial does not lie in a proceeding to settle the accounts of a receiver and to fix his compensation.—*State ex rel. Heinze v. District Court*, 227.

Motion for New Trial.

11. A motion which does not ask for a decision of an issue of fact arising upon formal pleadings is not the subject of a motion for new trial.—*State ex rel. Heinze v. District Court*, 227.

Bill of Exceptions—Settlement—Jurisdiction.

12. The court has no jurisdiction to settle a statement and bill of exceptions in support of a motion for a new trial in a proceeding when such motion does not lie.—*State ex rel. Heinze v. District Court*, 227.

Statement—Settlement—Appeal.

13. Under Code of Civil Procedure, Section 1173, providing that, if the amendments to the statement on motion for a new trial prepared by the adverse party are not adopted, the proposed statement and amendments shall, within ten days thereafter, be presented by the moving party to the judge, or delivered to the clerk for the judge, the court must disregard, on appeal, the statement and all questions sought to be presented thereby, when the moving party has failed to comply with such requirement.—*Wright v. Mathews*, 442.

Order Overruling Motion—Appeal.

14. Where the court's order overruling a motion for a new trial does not indicate the particular ground on which it was made, every legitimate indictment will be indulged to support it.—*Wright v. Mathews*, 442.

Statement—Amendments—Settlement.

15. Where the statement on motion for new trial and the defendant's proposed amendments were not presented to the judge within the ten days allowed by Code of Civil Procedure, Section 1173, it was proper to settle the same, and deny the motion for new trial.—*Wright v. Mathews*, 442.

Notice of Motion—Specifications.

16. Under Code of Civil Procedure, Section 1173, a specification merely alleging that the evidence is insufficient to justify a certain finding set out is insufficient.—*Finlen v. Heinze et al.*, 548.

Trial by Court—Misconduct of Judge.

17. Where an action was tried to the court, and a female employe of one of the successful defendants had communication with the judge, and wrote letters to him, to which he replied, soliciting further conversation with relation to the case while the same was being argued before him, and such letters containing reference to benefits to be derived by the judge in case of a decision favorable to the writer's employer, and the judge, in an affidavit submitted, failed to deny the authorship of the reply, such acts entitled plaintiff to a new trial.—*Finlen v. Heinze et al.*, 548.

NONSUIT.

Motion for Nonsuit—Evidence—Rule.

1. On motion for a nonsuit every fact will be deemed proved which the evidence tends to prove.—*Coleman v. Perry*, 1.

Nonsuit—Denial—Evidence—Review.

2. Evidence in an action by an employe for injuries received from machinery held sufficient to warrant the submission of plaintiff's case to the jury, and that a motion to nonsuit was properly denied.—*Coleman v. Perry*, 1.

PARTNERSHIP.

Accounting—Decree.

1. Where a complaint praying an accounting contained no allegation that the parties were partners, and there was no evidence to that effect, or that there were any profits from the project undertaken by them—the implication from the complaint being that there were none—it was error to decree an accounting and judgment for plaintiff's interest in the profits.—*Merrill v. Miller*, 134.

Instructions.

2. In an action against alleged copartners on an account stated, etc., where the answer of any one of the defendants denied the existence of any partnership, and also denied that plaintiff ever sold any goods to any copartnership of which said defendant was a member, and the evidence was in irreconcilable conflict on both issues, an instruction that in such cases as the one at bar, where an action is brought by a third person against a firm, less strictness of proof is required to show that a certain person was a copartner than is required in an action by one partner against another, was error for assuming the existence both of a partnership and of a partnership liability.—*Lawrence v. Westlake*, 503.

Instructions.

3. Under Code of Civil Procedure, Section 3390, which requires the judge on all proper occasions to charge the jury "that in civil cases the affirmative of the issue must be proved, and when the evidence is contradictory, the decision must be made according to the preponderance of the evidence,"

It was error to charge that, in actions against a firm by a third person, less strictness of proof was required to show partnership than is required in an action brought by one partner against another, preponderance of the evidence being required in both cases.—*Laurence v. Westlake*, 503.

Instructions.

4. An instruction that "a partnership may be shown by the separate admission, acts, declarations, or conduct of the parties, or by the acts of one, the declarations of another, and the acknowledgment or consent of a third," standing alone, is liable to mislead.—*Laurence v. Westlake*, 503.

PLEADINGS (Civil).

Failure to Reply.

1. Under Code of Civil Procedure, Section 720, requiring a reply only when the answer contains a counterclaim, failure to reply in a personal injury case does not admit allegations of contributory negligence. Mr. JUSTICE MILBURN dissenting in part.—*Coleman v. Perry*, 1.

Fraud.

2. Fraud is never presumed, nor can it be proved unless the ultimate facts constituting it be specifically alleged, and where no such facts are alleged, inferences and innuendoes are wholly insufficient as a pleading.—*Butte Hardware Co. v. Knox*, 111.

Counterclaim—Fraud—False Representations.

3. In an action on a note, defendant alleged by way of counterclaim that she had purchased a boiler of plaintiff, which was to be of a certain heating capacity, and that on testing the boiler it was found to be insufficient and otherwise defective. The only allegation that the seller made any representations as to the boiler, or that the buyer relied upon any such statements in making the purchase, was that the buyer was deceived by false representations that the boiler was a first-class boiler and sufficient, but there was no direct allegation that any such statements were made or relied on by the purchaser. It was alleged that the note in suit was given to settle the balance of an account, but there was no statement that this account represented the balance due on the boiler. *Held* not to state facts constituting a defense or counterclaim.—*Butte Hardware Co. v. Knox*, 111.

Complaint—Allegation of Equity.

4. A suit was brought to obtain a conveyance of an alleged interest in an invention, and to enjoin defendant from disposing thereof to a third party, based on an agreement to render mutual assistance in obtaining the patent. Plaintiff had procured loans of money in aid of the project, and negotiated a sale of an interest in the machine, the proceeds of which he and defendant agreed to use in taking the machine to the Klondike and operating it. Defendant had violated the agreement, and refused to assign plaintiff any interest in the machine, and threatened to sell the same to a third party, and converted the money procured by the sale negotiated by plaintiff to his own use. *Held*, it was not necessary for plaintiff to allege an offer to pay a proportionate part of the expenses of applying for a patent in defendant's name.—*Merrill v. Miller*, 134.

Complaint—Amendment.

5. It was not error for the court to permit an amendment to the complaint, after denial of a motion for nonsuit on plaintiff's evidence and

before judgment, where no hardship or surprise to defendant was shown, and where no change of the issue resulted.—*Merrill v. Miller*, 134.

Mechanic's Lien—Complaint—Sufficiency.

6. A complaint in an action to enforce a mechanic's lien must state that the necessary architect's certificate was given or demanded, and, if refused, the reasons why it should have been given, or, if waived, a statement of that fact.—*McGlauffin v. Wormser*, 177.

Mechanic's Lien—Complaint—Sufficiency.

7. Code of Civil Procedure, Section 2131, relative to mechanics' liens, provides the statutory steps which must be taken for its assertion. *Held* that, in an action to enforce a mechanic's lien, allegations showing compliance with Section 2131 are jurisdictional, and when denied must be proven as alleged, in order to authorize decree of foreclosure.—*McGlauffin v. Wormser*, 177.

Misjoinder of Cause of Action—Contract—Tort.

8. Actions on contracts and actions in tort cannot be united.—*Nelson v. Great Northern Ry. Co.*, 297.

Action Against Carrier—Complaint—Allegations.

9. The complaint in an action against a carrier for violations of a special contract of shipment must set out the contract either in substance or in *haec verba*, and must declare upon it.—*Nelson v. Great Northern Ry. Co.*, 297.

Action Against Carrier—Complaint—Allegations.

10. The complaint in an action in tort against a carrier for a breach of its common-law duties in the shipment of goods must allege facts which will show, not only the rights of the shipper, but the duties of the carrier as well.—*Nelson v. Great Northern Ry. Co.*, 297.

Action Against Carrier—Complaint.

11. A complaint, in an action brought to recover damages claimed to have been sustained by the plaintiff as a shipper of live stock over defendant's railroad, examined, and *held* to state a cause of action in tort.—*Nelson v. Great Northern Ry. Co.*, 297.

Conversion—Complaint.

12. In an action for conversion, an allegation that defendants converted and disposed of the property to their own use is an allegation of fact sufficient, in the absence of a special demurrer, to sustain a judgment for plaintiff.—*Stevens et al. v. Curran et al.*, 366.

Action for an Accounting—Complaint.

13. A demand by plaintiff for an accounting and a denial thereof by the defendant are necessary to be pleaded and proved in order to maintain an action for an accounting.—*Wetzstein v. Boston & Montana C. C. & S. Mining Co.*, 451.

Contracts—Specific Performance.

14. Where an action to recover an interest in a mining claim was tried on the issues raised by the counterclaim seeking specific performance of an

alleged contract by plaintiff to convey his interest in such claim to defendant, and the answer thereto, a decree of specific performance would not be reversed on the ground that defendant's answer to plaintiff's complaint alleged that plaintiff had forfeited all his rights to the mine prior to the date of the agreement sought to be enforced.—*Finlen v. Heinze et al.*, 548.

POWER OF ATTORNEY.

Power of Sale—Trust Deed.

1. An attorney in fact authorized to sell, convey, and mortgage the grantor's property may execute a trust deed conveying the grantor's individual property as security for the payment of a debt due from a firm of which he is a partner.—*Muth v. Goddard*, 237.

Power of Sale—Trust Deed.

2. Under Code of Civil Procedure, Section 3821, providing that a power of sale may be conferred on the mortgagee or any other person, to be exercised after a breach of the obligation for which the mortgage is security, and Code of Civil Procedure, Section 1293, declaring that, if a mortgage confers a power of sale after a breach, foreclosure may be had, an attorney in fact under a general power of attorney to sell, convey, and mortgage the grantor's property may secure the payment of his grantor's debt by executing a trust deed conveying the grantor's property, and authorizing the trustee or his successor in trust to sell the same in case of nonpayment of the indebtedness.—*Muth v. Goddard*, 237.

Power of Sale—Trust Deed.

3. Whether an attorney in fact under a general power of attorney may execute a trust deed conveying a stipulation for attorney's fees in case the deed is enforced by an action is immaterial where the trustee in the deed sells the property under a power of sale therein granted.—*Muth v. Goddard*, 237.

Firm Debts—Guaranty.

4. Where a person is liable on notes executed by a firm in payment of firm debts because a partner in the firm, a guaranty of the payment of the notes, executed by his attorney in fact, imposes no additional obligation.—*Muth v. Goddard*, 237.

Authority of Attorney.

5. Under a general power of attorney, the agent cannot lawfully do any act unless it be for the principal's use and benefit.—*Muth v. Goddard*, 237.

PRESUMPTIONS.

As to findings of court, see INJUNCTION, 2; APPEAL, 63.

As to powers of officers of corporations, see CORPORATIONS, 2.

As to mining property, see MINES AND MINING, 4.

PROMISSORY NOTES.

Negotiability—Provisions for Attorney's Fees.

1. Laws of 1899, page 115, amending Section 3996, Civil Code, so as to permit a negotiable instrument to contain a provision for reasonable attorney

fee, was prospective in its operation only, and did not make negotiable a note, given before its passage, which was non-negotiable by reason of its containing a provision for attorney's fee.—*Bullard v. Smith*, 387.

Consideration.

2. Where plaintiff believed that certain property had been stolen from him, and that defendant was connected with the theft, and the latter gave a note to plaintiff for the damages occasioned by the theft, there was a sufficient consideration for the note.—*Bullard v. Smith*, 387.

Duress—Evidence.

3. Evidence considered, and held insufficient to sustain a jury finding that the note sued on was executed under duress.—*Bullard v. Smith*, 387.

Non-Negotiable Note—Burden of Proof.

4. When a suit is brought by an indorsee or assignee of a non-negotiable note, the burden of proof is upon him to show that the note was originally issued upon valuable consideration, and that he is a *bona fide* holder thereof, but the burden does not also rest upon him to show that no other defense exists to the note.—*Bullard v. Smith*, 387.

Duress—Burden of Proof.

5. In an action on a note, the burden of proving duress is on defendant.—*Bullard v. Smith*, 387.

PUBLIC LANDS.

Unsurveyed Portion of Townsite—Conveyance.

1. Under Act of Congress, March 2, 1867, as amended by Act July 1, 1870, and Compiled Statutes of Montana, 1871-2, page 546, *et seq.*, a district judge has no jurisdiction to issue a deed for an unsurveyed portion of a townsite to a person not claiming to be an occupant of the land at the time the townsite was entered, before such portion had been surveyed, platted, and necessary streets, etc., laid out as required by Section 5117 of the Political Code.—*State ex rel. Hicklin v. Webster*, 104.

Homestead—Residence.

2. A residence for voting purposes in another precinct than that in which land is situated precludes an entryman from claiming residence at the same time on the land for homestead purposes.—*Small v. Rakestraw*, 413.

Homestead—Decision by Land Department—Review by the Courts.

3. The question of an entryman's residence upon the land and the *bona fides* of his settlement thereon is one of fact the determination of which by the officers of the land department is conclusive upon the courts, in the absence of fraud or imposition.—*Small v. Rakestraw*, 413.

Homestead—Residence—Decision by Land Department—Review by the Courts.

4. It not appearing that the secretary of the interior, in holding that one claiming under the homestead law had not complied therewith as to residence, had no other evidence before him than that he had a residence for voting purposes in another precinct, it cannot be said that his decision was on an erroneous construction of the law, so as to allow interference by a

court, even if his holding that residence for voting purposes in one precinct precluded his claiming residence at the same time on land in another precinct for homestead purposes was wrong.—*Small v. Rakestraw*, 413.

Homestead—Patent—Trustee—Evidence.

5. That the holder of the legal title under a patent may be adjudged to hold it as trustee for plaintiff, because of an erroneous ruling of the land department, it is necessary to show not only that defendant was not entitled to the patent, but that plaintiff was so entitled.—*Small v. Rakestraw*, 413.

RECEIVERS.

Order of Appointment—Appeal.

1. Under the express provisions of Session Laws of 1890, p. 146, an *ex parte* order appointing a receiver is appealable.—*Rumney v. Donovan*, 69.

Order of Appointment—Appeal—*Supersedes*—Return of Property.

2. An order of the supreme court staying proceedings under an order appointing a receiver requires the immediate return of the property to the person from whom it was taken.—*Rumney v. Donovan*, 69.

Order of Appointment—Appeal—*Supersedes*—Contempt.

3. Where, after an order of the supreme court staying proceedings under an order appointing a receiver, the receiver, in good faith and under advice of counsel, did not return the property to the person from whom it was taken, the question of whether or not the order staying proceedings operated to require such a return being previously unlitigated, the receiver was guilty of merely a technical contempt, and should be required to pay only a nominal fine.—*Rumney v. Donovan*, 69.

Discharge—Appeal.

4. In an action to recover for professional services rendered by an attorney in contesting a will, the court, prior to the trial, appointed a receiver to receipt to the administrator of the decedent's estate for the defendants' shares therein, and to preserve them pending a termination of the action. Afterwards judgment went for defendants. *Held*, proper to discharge the receiver pending an appeal.—*Harris v. Root*; 159.

Appealable Orders.

5. Pending an action to settle a controversy as to the ownership of a mining claim, a receiver was appointed. On appeal the order of appointment was reversed. Thereafter, on January 17th, a hearing was had on the final report of the receiver, and at the conclusion thereof the court made an order fixing his compensation at a certain sum, and allowing him certain further sums for counsel and stenographer's fees. The order contained no provision as to who should be charged with these allowances. Two days later the receiver moved for an order requiring the plaintiff in the action to pay the allowances, and on January 31st the motion was granted, and an order entered in the form of a final judgment against the plaintiff for the amount thereof. *Held*, that the order of January 31st, and not that of January 17th, was the appealable order.—*State ex rel. Heinze v. District Court*, 227.

REFEREES.

Bill of Exceptions—Settlement.

1. Under Code of Civil Procedure, Section 1152. It is the duty of counsel to incorporate in their bill of exceptions so much of the evidence in substance as is necessary to explain the objection and exception reserved thereon, and a referee is justified in refusing to settle a bill which recites, "The following testimony was taken before the referee: (Clerk will here insert testimony)."—*State ex rel. Power v. Napton*, 336.

Report—Correction.

2. *Semble*: After a referee has filed his report, he may file corrections of manifest clerical errors in his report, without another reference of the case for the purpose of permitting him to make them.—*State ex rel. Power v. Napton*, 336.

RULES OF SUPREME COURT.

Defective Brief—Affirmance of Judgment.

1. Where appellant's brief falls wholly to comply with Subdivision 3 of Rule X of the Supreme Court, the judgment appealed from will be affirmed.—*Larkin v. Butte & Boston Con. Min. Co.*, 41.

Respondent's Failure to File Brief in Time—Penalty.

2. Under Supreme Court Rule X, Subdivisions 4 and 5, in the absence of consent by his adversary or an order of the court based upon a sufficient showing of some reason why the rule should be relaxed, counsel for respondent (when in default under the rule) may not file a brief or appear and argue orally the questions presented by the appeal, unless by express request of the court,—and a brief filed in violation of the rule will be stricken from the files.—*Knobb v. Reed*, 42.

Defective Brief—Affirmance of Judgment.

3. Under Supreme Court, Rule X, Section 3, an appellant's brief referring to the complaint, with citation of page and marginal number, but to no other matter which would aid the court in examining the points in controversy, is not a compliance with the rule, and necessitates an affirmance of the judgment.—*Knobb v. Reed*, 42.

Defective Brief—Affirmance of Judgment.

4. Judgment below will be affirmed where the record and appellant's brief fall completely to comply with the requirements of the statutes and the Rules of the Supreme Court.—*Frederick v. McMahon*, 263.

Defective Brief—Assignments of Error.

5. Assignments of error in appellants' brief which fail to comply with the rules of the supreme court, will not be considered.—*Cook et al. v. Gallatin Railroad Co. et al.*, 340.

Briefs—Assignments of Error.

6. Where the overruling of a motion is assigned as error, and the language of the motion as it appears in the transcript is not the language of the assignment and does not convey the same idea, the assignment will not be considered.—*Cook et al. v. Gallatin Railroad Co. et al.*, 340.

Briefs—Assignments of Error.

7. Where the record fails to show that the court ruled upon an offer of testimony, an assignment based upon the exclusion of such testimony will not be considered.—*Cook et al. v. Gallatin Railroad Co. et al.*, 340.

Transcript on Appeal.

8. The unnecessary incorporation of formal parts of pleadings, writs and other papers in the transcript on appeal, in violation of Supreme Court Rule VII, is not ground for dismissal of the appeal.—*Greene v. Montana Brewing Co.*, 380.

Transcript on Appeal.

9. Where appellant unnecessarily incorporated formal parts of pleadings, writs and other papers in the transcript on appeal in violation of Supreme Court Rule VII, he was not entitled to recover the expense of printing that portion of the transcript so incorporated.—*Greene v. Montana Brewing Co.*, 380.

Defective Brief—Affirmance of Judgment.

10. Failure of appellant's brief to comply with the provisions of Subdivision "a" of Subsection 3 of Rule X of the Rules of the Supreme Court is fatal to the appeal.—*Allen v. Reely*, 525.

Failure of Respondent to File Brief.

11. Where it appears to the court that the respondent has failed to file his brief within the time required by the rules, and it further appearing that the appellant does not consent to the appearance of said respondent, and the court not requesting the same (Rule X, Subdivisions 4 and 5), the said respondent will not be permitted to be heard at the hearing of the appeal.—*Conley v. Dunn*, 585.

STARE DECISIS.

Question of Practice.

Where the court has fallen into error upon a question of practice, and the correction of that error can in no way or manner injure any litigant in pending cases, the decision making the mistake should be overruled and the true and correct practice stated.—*King v. Pony Gold Mining Co.*, 74.

STATUTE OF LIMITATIONS.

Corporations—Liability of Stockholders.

1. Under Compiled Statutes of 1887, Division V, Section 457, providing that the stockholders of every company incorporated under the act shall be liable to the creditors of the company to the amount of unpaid stock held by them, etc., the liability of the stockholders arises only after execution on a judgment against the corporation has been returned unsatisfied, and limitations do not begin to run against an action against the stockholders until such time.—*King v. Pony Gold Mining Co.*, 74.

Mortgage—Renewal of Note—Effect.

2. A note secured by mortgage fell due June 11, 1886, and by the statute in force at that time action thereon would be outlawed in six years. Act 1889 (Sess. Laws 1889, p. 172) extended the period within which actions

might be brought on written instruments to eight years, but expressly provided that the Act should not affect causes of action accrued prior to its passage. Code of Civil Procedure, Section 557, provides that the limitations prescribed therein shall not apply to causes of action which have become barred by existing statutes. *Held*, that the Act of 1889 and the limitations prescribed in the Code had no application to the note in suit, but it was governed by the law in force at its maturity.—*Wilson v. Pickering*, 435.

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STATUTORY CONSTRUCTION.

Statute Enacting Portion of the Common Law.

1. Where a statute is taken from another state it is taken subject to the interpretation placed upon it by the courts of that state, and this doctrine applies when a portion of the common law is enacted as a part of the statute.—*Nelson v. Great Northern Ry. Co.*, 397.

General Rule.

2. In the construction of statutes the meaning and intent of the legislature must be arrived at and enforced.—*Bullard v. Smith*, 387.

Retroactive Legislation.

3. Section 4651, Civil Code, not only applies to the Code of which it is a part, but to all amendments to such Code thereafter made.—*Bullard v. Smith*, 387.

Statute Taken from Another State.

4. Notwithstanding a statute may have been taken from another state, the supreme court will decline to follow the decisions of such state upon the subject when they are in direct conflict with its own decisions and are

opposed to what appears to it to be the better reasoning.—*Finlen v. Heinsoe et al.*, 548.

SUPREME COURT.

Original Jurisdiction—Propriety of Exercise—Injunction.

1. The supreme court will not entertain an original proceeding to test, by an injunction to restrain the state text-book commission from advertising for bids, the constitutionality of a statute relating to a uniform system of text-books, and requiring the books contracted for to bear "union labels"; no pressing necessity appearing for a speedy determination of the question, the court calendar being three years in arrears, and the matter being one, which should ordinarily, and in the first instance, be submitted to the district court; especially where it is apparent that the interests of the public, so far as they are involved, may be as well protected if the parties are left to pursue the usual course.—*Snell v. Welch*, 37.

Original Jurisdiction.

2. The power to issue, hear and determine the six original writs enumerated (Constitution, Art. VIII, Sec. 3), marks the limit of the original jurisdiction of the supreme court.—*In re Weston*, 207.

Appellate Jurisdiction.

3. Under Constitution, Article VIII, the ordinary appellate power of the supreme court is limited to a review of the decision of the lower court, and a judgment affirming, modifying or reversing such decision,—with the strictly ancillary power to issue, hear and determine such original and remedial writs as may be necessary or proper to the competent exercise of this appellate jurisdiction.—*In re Weston*, 207.

Supervisory Jurisdiction.

4. Under Constitution, Article VIII, Section 2, the power of supervisory control is lodged in the supreme court sitting as an organized judicial body, and such power operates only upon inferior courts; it cannot extend to or affect any other body or any individual or individuals.—*In re Weston*, 207.

Constitutional Limit to Power of Legislature.

5. Under Constitution, Article IV, Section 1, the legislature cannot impose upon the supreme court, or its justices, the performance of an act not judicial in its character but purely ministerial or executive.—*In re Weston*, 207.

Supervisory Control—District Judges—Disqualification.

6. *Quaere*: Has the supreme court, under its power of supervisory control, power to control a lower court, by prohibiting the judge thereof from proceeding with the trial of a cause, if it were made manifest that he was for any reason incapable of giving either of the parties a fair trial?—*In re Weston*, 207.

Appellate Jurisdiction.

7. The appellate jurisdiction of the supreme court may be exercised only under limitations and regulations prescribed by law touching the time within which and the mode by which appeals may be taken.—*Cornell v. Matthews*, 457; *Beck v. Holland*, 460.

Appellate Jurisdiction.

8. Under Constitution, Article VIII, Sections 2, 3, 15, the supreme court has jurisdiction to entertain appeals or writs of error only when the statutory requirements have been complied with.—*Featherman v. Granite County*, 462; *Emerson v. McNair et al.*, 578.

Supervisory Control—Bias and Prejudice of District Judge.

9. In the absence of legislative enactment declaring bias and prejudice to be a disqualification of a district judge to preside in the trial of a cause, the supreme court, under its power of supervisory control, has no power to prohibit such judge from proceeding with the trial of a cause.—*State ex rel. Anaconda Copper Mining Co. v. District Court*, 590.

TAXATION.

Personal Property—Assessment—Misnomer.

1. Political Code, Sections 3700, 3707, which provide that personal property must be assessed to the person by whom it is owned or claimed, and that if the name of an absent owner is unknown it must be assessed to "unknown owners," are mandatory, and a misnomer of the owner of personal property assessed as the property of a particular person vitiates the assessment and renders a sale thereunder void; Section 3916, which provides that, when land is sold for taxes correctly imposed as the property of a particular person, no misnomer of the owner, or supposed owner, shall affect the sale, not applying to personal property.—*Birney v. Warren*, 64.

Personal Property—Sale—*Caveat Emptor*.

2. The rule of *caveat emptor* applies to sales of property for delinquent taxes.—*Birney v. Warren*, 64.

Board of Equalization—Increase in Assessment—Notice.

3. Under Political Code, Section 3789, providing that persons interested must be notified by letter, at least ten days before action is taken, of the day when an increase in a tax assessment will be considered by the board of county commissioners sitting as a board of equalization, the ten-day notice is jurisdictional.—*Western Ranches v. Custer County*, 278.

Board of Equalization—Increase of Assessment—Notice—Waiver.

4. Failure to give a taxpayer the ten-day notice of a proposed increase in his assessment, required by Political Code, Section 3789, is not waived by his subsequently appearing and securing a reduction of the increased assessment.—*Western Ranches v. Custer County*, 278.

Levy—Property Not Owned by Taxpayer.

5. A tax cannot be lawfully levied against a person for property which he does not own.—*Western Ranches v. Custer County*, 278.

Unlawful Levy—Remedy.

6. Political Code, Section 4023, authorizes an injunction to restrain the collection of an illegal or unauthorized tax. Section 4024 provides that in all cases "of levy of taxes," etc., deemed unlawful by the property owner, he may, under protest, pay such tax, and thereupon sue to recover it. Section 4026 provides that this remedy shall supersede injunction and

all other remedies which might be invoked to prevent the collection of taxes alleged to be irregularly "levied or demanded," etc. *Held*, that Section 4024, being construed with Section 4026, is not restricted to cases in which the levy is assailed as unlawful, but suit thereunder might be brought when an assessment was void, notwithstanding Section 4023.—*Western Ranches v. Custer County*, 278.

Illegal Taxes—Action for Restitution—Statutory Construction.

7. Under Political Code, Section 5185, providing that if any of the acts enumerated in such Code are inconsistent with any acts passed by the Fourth legislative assembly the latter shall control, Sections 4024 and 4026, providing a special remedy by suit for the recovery of illegal taxes, being part of the special act approved March 18, 1895, will control, in case of conflict, Section 4023, authorizing injunction; the latter section having been recommended by the code commission.—*Western Ranches v. Custer County*, 278.

Increase of Assessment—Legality.

8. An increase in an assessment by the assessor in obedience to a void order of the board of equalization cannot be justified under Political Code, Sections 3701, 4014, under which the assessor may assess at any time property which has escaped taxation.—*Western Ranches v. Custer County*, 278.

Board of Equalization—Increase in Assessment—Notice.

9. Political Code, Section 3780, requires the board of county commissioners to meet as a board of equalization on the third Monday of July, and continue in session from time to time not later than the second Monday in August. Section 3780 requires a ten-day notice to be given by mail to persons interested of a contemplated increase in a tax assessment by the board of equalization. *Held*, that a notice mailed August 8th was void, the functions of the board as a board of equalization expiring on the second Monday of August, which was the 10th of the month.—*Matador Land & Cattle Co. v. Custer County*, 286.

Insurance Companies.

10. Section 681 of the Civil Code applies to domestic, as well as foreign, insurance companies, and therefore complies with Section 11, Article XII, of the State Constitution, which provides that taxes shall be "uniform upon the same class of subjects."—*Northwestern Mutual Life Ins. Co. v. Lewis and Clarke County*, 484.

Foreign Corporations.

11. The franchise right of a foreign company to do business in this state is property, and if it proves valuable, it is a proper subject for taxation within the meaning of Article XII of the State Constitution.—*Northwestern Mutual Life Ins. Co. v. Lewis and Clarke County*, 484.

Insurance Companies—Foreign and Domestic.

12. Section 681 of the Civil Code was not repealed by implication by Act March 4, 1897 (Session Laws 1897, p. 76), which is a general license law relating to insurance companies, both domestic and foreign, and applying to all classes and kinds of insurance; the fee therein provided for being required to be paid prior to the transaction of any business, and being a fixed sum, varying in amount only at the will of the company as to the

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STATUTORY CONSTRUCTION.

Statute Enacting Portion of the Common Law.

1. Where a statute is taken from another state it is taken subject to the interpretation placed upon it by the courts of that state, and this doctrine applies when a portion of the common law is enacted as a part of the statute.—*Nelson v. Great Northern Ry. Co.*, 397.

General Rule.

2. In the construction of statutes the meaning and intent of the legislature must be arrived at and enforced.—*Bullard v. Smith*, 387.

Retroactive Legislation.

3. Section 4651, Civil Code, not only applies to the Code of which it is a part, but to all amendments to such Code thereafter made.—*Bullard v. Smith*, 387.

Statute Taken from Another State.

4. Notwithstanding a statute may have been taken from another state, the supreme court will decline to follow the decisions of such state upon the subject when they are in direct conflict with its own decisions and are

opposed to what appears to it to be the better reasoning.—*Finlen v. Heinse et al.*, 548.

SUPREME COURT.

Original Jurisdiction—Propriety of Exercise—Injunction.

1. The supreme court will not entertain an original proceeding to test, by an injunction to restrain the state text-book commission from advertising for bids, the constitutionality of a statute relating to a uniform system of text-books, and requiring the books contracted for to bear "union labels"; no pressing necessity appearing for a speedy determination of the question, the court calendar being three years in arrears, and the matter being one which should ordinarily, and in the first instance, be submitted to the district court; especially where it is apparent that the interests of the public, so far as they are involved, may be as well protected if the parties are left to pursue the usual course.—*Snell v. Welch*, 37.

Original Jurisdiction.

2. The power to issue, hear and determine the six original writs enumerated (Constitution, Art. VIII, Sec. 3), marks the limit of the original jurisdiction of the supreme court.—*In re Weston*, 207.

Appellate Jurisdiction.

3. Under Constitution, Article VIII, the ordinary appellate power of the supreme court is limited to a review of the decision of the lower court, and a judgment affirming, modifying or reversing such decision,—with the strictly ancillary power to issue, hear and determine such original and remedial writs as may be necessary or proper to the competent exercise of this appellate jurisdiction.—*In re Weston*, 207.

Supervisory Jurisdiction.

4. Under Constitution, Article, VIII, Section 2, the power of supervisory control is lodged in the supreme court sitting as an organized judicial body, and such power operates only upon inferior courts; it cannot extend to or affect any other body or any individual or individuals.—*In re Weston*, 207.

Constitutional Limit to Power of Legislature.

5. Under Constitution, Article IV, Section 1, the legislature cannot impose upon the supreme court, or its justices, the performance of an act not judicial in its character but purely ministerial or executive.—*In re Weston*, 207.

Supervisory Control—District Judges—Disqualification.

6. *Quære*: Has the supreme court, under its power of supervisory control, power to control a lower court, by prohibiting the judge thereof from proceeding with the trial of a cause, if it were made manifest that he was for any reason incapable of giving either of the parties a fair trial?—*In re Weston*, 207.

Appellate Jurisdiction.

7. The appellate jurisdiction of the supreme court may be exercised only under limitations and regulations prescribed by law touching the time within which and the mode by which appeals may be taken.—*Cornell v. Matthews*, 457; *Beck v. Holland*, 460.

Appellate Jurisdiction.

8. Under Constitution, Article VIII, Sections 2, 3, 15, the supreme court has jurisdiction to entertain appeals or writs of error only when the statutory requirements have been complied with.—*Featherman v. Granite County*, 462; *Emerson v. McNair et al.*, 578.

Supervisory Control—Bias and Prejudice of District Judge.

9. In the absence of legislative enactment declaring bias and prejudice to be a disqualification of a district judge to preside in the trial of a cause, the supreme court, under its power of supervisory control, has no power to prohibit such judge from proceeding with the trial of a cause.—*State ex rel. Anaconda Copper Mining Co. v. District Court*, 590.

TAXATION.

Personal Property—Assessment—Misinomer.

1. Political Code, Sections 3700, 3707, which provide that personal property must be assessed to the person by whom it is owned or claimed, and that if the name of an absent owner is unknown it must be assessed to "unknown owners," are mandatory, and a misnomer of the owner of personal property assessed as the property of a particular person vitiates the assessment and renders a sale thereunder void; Section 3916, which provides that, when land is sold for taxes correctly imposed as the property of a particular person, no misnomer of the owner, or supposed owner, shall affect the sale, not applying to personal property.—*Birney v. Warren*, 64.

Personal Property—Sale—*Caveat Emptor*.

2. The rule of *caveat emptor* applies to sales of property for delinquent taxes.—*Birney v. Warren*, 64.

Board of Equalization—Increase in Assessment—Notice.

3. Under Political Code, Section 3789, providing that persons interested must be notified by letter, at least ten days before action is taken, of the day when an increase in a tax assessment will be considered by the board of county commissioners sitting as a board of equalization, the ten-day notice is jurisdictional.—*Western Ranches v. Custer County*, 278.

Board of Equalization—Increase of Assessment—Notice—Waiver.

4. Failure to give a taxpayer the ten-day notice of a proposed increase in his assessment, required by Political Code, Section 3789, is not waived by his subsequently appearing and securing a reduction of the increased assessment.—*Western Ranches v. Custer County*, 278.

Levy—Property Not Owned by Taxpayer.

5. A tax cannot be lawfully levied against a person for property which he does not own.—*Western Ranches v. Custer County*, 278.

Unlawful Levy—Remedy.

6. Political Code, Section 4023, authorizes an injunction to restrain the collection of an illegal or unauthorized tax. Section 4024 provides that in all cases "of levy of taxes," etc., deemed unlawful by the property owner, he may, under protest, pay such tax, and thereupon sue to recover it. Section 4026 provides that this remedy shall supersede injunction and

all other remedies which might be invoked to prevent the collection of taxes alleged to be irregularly "levied or demanded," etc. *Held*, that Section 4024, being construed with Section 4026, is not restricted to cases in which the levy is assailed as unlawful, but suit thereunder might be brought when an assessment was void, notwithstanding Section 4023.—*Western Ranches v. Custer County*, 278.

Illegal Taxes—Action for Restitution—Statutory Construction.

7. Under Political Code, Section 5185, providing that if any of the acts enumerated in such Code are inconsistent with any acts passed by the Fourth legislative assembly the latter shall control, Sections 4024 and 4026, providing a special remedy by suit for the recovery of illegal taxes, being part of the special act approved March 18, 1895, will control, in case of conflict, Section 4023, authorizing injunction; the latter section having been recommended by the code commission.—*Western Ranches v. Custer County*, 278.

Increase of Assessment—Legality.

8. An increase in an assessment by the assessor in obedience to a void order of the board of equalization cannot be justified under Political Code, Sections 3701, 4014, under which the assessor may assess at any time property which has escaped taxation.—*Western Ranches v. Custer County*, 278.

Board of Equalization—Increase in Assessment—Notice.

9. Political Code, Section 3780, requires the board of county commissioners to meet as a board of equalization on the third Monday of July, and continue in session from time to time not later than the second Monday in August. Section 3789 requires a ten-day notice to be given by mail to persons interested of a contemplated increase in a tax assessment by the board of equalization. *Held*, that a notice mailed August 8th was void, the functions of the board as a board of equalization expiring on the second Monday of August, which was the 10th of the month.—*Matador Land & Cattle Co. v. Custer County*, 286.

Insurance Companies.

10. Section 681 of the Civil Code applies to domestic, as well as foreign, insurance companies, and therefore complies with Section 11, Article XII, of the State Constitution, which provides that taxes shall be "uniform upon the same class of subjects."—*Northwestern Mutual Life Ins. Co. v. Lewis and Clarke County*, 484.

Foreign Corporations.

11. The franchise right of a foreign company to do business in this state is property, and if it proves valuable, it is a proper subject for taxation within the meaning of Article XII of the State Constitution.—*Northwestern Mutual Life Ins. Co. v. Lewis and Clarke County*, 484.

Insurance Companies—Foreign and Domestic.

12. Section 681 of the Civil Code was not repealed by implication by Act March 4, 1897 (Session Laws 1897, p. 76), which is a general license law relating to insurance companies, both domestic and foreign, and applying to all classes and kinds of insurance; the fee therein provided for being required to be paid prior to the transaction of any business, and being a fixed sum, varying in amount only at the will of the company as to the

amount of premiums it asks permission to collect, and not being diminished by reason of losses paid or expenses incurred.—*Northwestern Mutual Life Ins. Co. v. Lewis and Clarke County*, 484.

Insurance Companies—Foreign and Domestic.

13. Section 681 of the Civil Code declares that "each and every insurance corporation or company transacting business in this state must be taxed upon the excess of premiums received over losses and ordinary expenses incurred within the state during the year." It further provides that "insurance companies and corporations are subject to no other taxation under the laws of this state, except taxes on real estate and fees imposed by law." *Held*, that the clause last quoted was unconstitutional, but that the invalidity of this clause did not render unconstitutional nor void the remainder of the section.—*Northwestern Mutual Life Ins. Co. v. Lewis and Clarke County*, 484.

TRIAL.

Order of Proof.

1. The admission of evidence in chief for the purpose of disproving an affirmative defense in defendant's answer, which would have been proper in rebuttal, was not error.—*Tague v. John Caplice Co.*, 51.

Withdrawing Issue from Jury.

2. Where there was no evidence whatever on an issue raised by the pleadings, it was proper to withdraw such issue from the jury.—*Tague v. John Caplice Co.*, 51.

Witnesses—Examination in Chief—Evidence.

3. It was not error to exclude evidence of plaintiff in chief, which, though relevant to the issue made by the answer, was not necessary to establish the case as alleged in the complaint.—*Lisker v. O'Rourke*, 129.

Witnesses—Exclusion of Evidence.

4. It was not error to strike out a voluntary statement made by defendant, not responsive to the question asked him, and irrelevant to the issues in the case.—*Lisker v. O'Rourke*, 129.

Amendment of Complaint.

5. It was not error for the court to permit an amendment to the complaint, after denial of a motion for nonsuit on plaintiff's evidence and before judgment, where no hardship or surprise to defendant was shown, and where no change of the issue resulted.—*Merrill v. Müller*, 134.

Witness—Examination—Purpose of Question.

6. Where, on asking a question, counsel, in response to a query by the court, stated the purpose of the testimony sought to be brought out, he was precluded from thereafter claiming a different purpose.—*Bullard v. Smith*, 387.

Witness—Privilege—Ruling of Court—Review.

7. Alleged error in failing to require a witness to answer a question, which he refused to answer on the ground that it involved a privileged communication from a client, was not cause for reversal, where the evidence sought to be elicited was inadmissible, though no objection was made at the time.—*Bullard v. Smith*, 387.

Right to Open and Close.

8. Under Code of Civil Procedure, Section 2340, in a will contest, the contestants have the burden of proof, and are entitled to open and close.—*Farleigh v. Kelley*, 421.

Exclusion of Evidence—Harmless Error.

9. Where a question objected to and excluded had been previously answered, the refusal of the court to permit its repetition was not error.—*Finlen v. Heinse*, 548.

TRUST DEED.

See POWER OF ATTORNEY.

Power of Sale—Effect of Death of Grantor.

1. A trust deed, given as security for a debt, and containing a stipulation authorizing the trustee to sell the property after default, authorizes the trustee to exercise the power after the grantor's death; it being a power coupled with an interest, and thereafter not revoked by the grantor's death.—*Muth v. Goddard*, 237.

Power of Sale—Effect of Death of Grantor.

2. Where a trust deed, given as security for a debt, conveys to him the legal title to the property therein described, and authorizes him to sell the same after default, the death of the grantor does not affect the trustee's right to exercise the power of sale.—*Muth v. Goddard*, 237.

Power of Sale—Effect of Death of Grantor.

3. Under Code of Civil Procedure, Section 2603, authorizing the foreclosure of mortgages though the mortgagor is dead, a trustee in a trust deed given as security for the payment of a debt, and authorizing him to sell the property after default, may, after the death of the grantor, exercise the power of sale without reference to the administration of the grantor's estate.—*Muth v. Goddard*, 237.

VENUE.

See CRIMINAL LAW, 1.
JUSTICE OF THE PEACE.

WAIVER.

See EVIDENCE, 15.
TAXATION, 4.

WATER RIGHTS.

Evidence.

1. In an action to enjoin defendants from diverting certain waters claimed by plaintiffs for irrigation purposes, the parties stipulated that no question should be made as to the titles of the respective parties to the lands described in the pleadings, and in connection with which the water claimed by each was to be used. Held, that evidence that defendants' premises were located upon an Indian reservation, which they could not lawfully occupy, was inadmissible.—*Phillips v. Coburn*, 45.

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